Supreme Court, U.S.
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No. ____

IN THE

Supreme Court of the United States

HAROLD LEE HARVEY, JR.,
Petitioner,

v.

STATE OF FLORIDA,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Florida

PETITION FOR WRIT OF CERTIORARI

DONALD B. VERRILLI, JR.
Jenner & Block LLP
601 13th Street, N.W.
Washington, D.C. 20005
(202) 639-6000

ROSS B. BRICKER*
JEFFREY A. KOPPY
THOMAS P. MONROE
LYDIA M. FLOYD
Jenner & Block LLP
One IBM Plaza
Chicago, Illinois 60611
(312) 222-9350

*Counsel of Record

Attorneys for Harold Lee Harvey, Jr.

CAPITAL CASE

I. QUESTIONS PRESENTED

In this capital case, the Florida Supreme Court denied post-conviction relief by finding that counsel rendered effective assistance of counsel to petitioner Harold Lee Harvey, Jr. The questions presented are:

1. Does trial counsel violate the requirements of *Strickland v. Washington* by failing to remove a juror who repeatedly admits during voir dire that she cannot be fair and impartial as the Sixth Circuit has held, or can capital counsel make a strategic decision to accept a biased juror as the Florida Supreme Court concluded?

2. Did the Florida Supreme Court err by misinterpreting this Court's decision in *Florida v. Nixon* to permit trial counsel to concede a client's guilt to first-degree murder without consultation or authorization and vacating its order granting Mr. Harvey a new trial?

3. Does capital counsel violate *Strickland v. Washington* and its progeny by failing to investigate available mental health mitigation evidence that could have convinced a jury to impose a life sentence, as this Court concluded in *Wiggins v. Smith*, where (i) counsel's expert psychologist recommended retaining (and the trial court specifically approved) a forensic psychiatrist to investigate signs indicative of organic brain damage but counsel neglected to obtain or consider such evidence because he was following a pre-determined approach to present Mr. Harvey as a "good person"; and (ii) had counsel investigated such evidence, he would have discovered that Mr. Harvey suffered from organic brain damage and other mental illnesses at the time of the crime and impacted his capacity and established three statutory mitigators under Florida's law.

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II. PETITION FOR WRIT OF CERTIORARI.

Harold Lee Harvey, Jr. respectfully petitions for a writ of certiorari to review a decision of the Florida Supreme Court.

III. OPINIONS BELOW.

The Florida Supreme Court's opinions denying relief on the issues raised in this petition are reported at 656 So. 2d 1253 (Fla. 1995) (Pet. App. C, 39a-49a) and 946 So. 2d 937 (Fla. 2006) (Pet. App. A, 1a-24a).

IV. STATEMENT OF JURISDICTION.

On June 15, 2006, the Florida Supreme Court denied Mr. Harvey post-conviction relief. On January 8, 2007, the Florida Supreme Court denied Mr. Harvey's Motion for Rehearing. (Pet. App. F, 67a.) The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a).

V. CONSTITUTIONAL PROVISION INVOLVED.

This case involves the Sixth Amendment to the United States Constitution reprinted at Pet. App. G, 69a.

VI. PROCEDURAL POSTURE.

A. Mr. Harvey's Trial and Direct Appeal.

On February 27, 1985, Harold Lee Harvey, Jr. was arrested and charged with second-degree murder and robbery in connection with the deaths of William and Ruby Boyd. On March 7, 1985, Mr. Harvey was indicted for two counts of first-degree murder.

The guilt phase of Mr. Harvey's trial began on June 9, 1986. The State's evidence of guilt went essentially

unchallenged. Mr. Harvey's trial counsel, Robert Watson ("Trial Counsel"), did not call any witnesses in his guilt-phase defense. Nor did he conduct any meaningful cross-examination of the State's witnesses. The jury deliberated less than one hour and on June 18, 1986, returned guilty verdicts on two counts of first-degree murder.

The jury subsequently voted eleven to one to recommend sentences of death on both counts. (R. 3046-47.)[1] The court followed the jury's recommendation, finding the State had established four statutory aggravating factors: (1) the murder was committed while engaged in a robbery or burglary; (2) it was heinous, atrocious, and cruel; (3) it was committed for the purpose of avoiding lawful arrest; and (4) it was committed in a cold, calculated, and premeditated manner. *Harvey v. State*, 529 So. 2d 1083, 1087 & n.4 (Fla. 1988). The only mitigating factors the court found were non-statutory factors of low IQ, poor educational skills and poor social skills. *Id.* at n.5.

On June 16, 1988, the Florida Supreme Court affirmed the trial court's judgment. *Id.* at 1088. This Court denied certiorari on February 21, 1989. *Harvey v. Florida*, 489 U.S. 1040 (1989).

B. State Post-Conviction Proceedings.

1. The post-conviction motion.

On August 27, 1990, Mr. Harvey filed a motion for post-conviction relief. (CR. 169-548.) On October 5, 1992, the

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[1] The record in this case comes from three sources: (1) the record from Mr. Harvey's direct appeal "(R._____)"; (2) the collateral record from Mr. Harvey's appeal from the first denial of his post-conviction motion "(CR.____)"; and (3) the post-conviction record from the 1998 evidentiary hearing on Mr. Harvey's motion "(PCR.___)".

trial court summarily denied all but one of Mr. Harvey's claims and denied the surviving claim on March 17, 1993 after an evidentiary hearing. (Pet. App. E, 65a-66a.)

Mr. Harvey timely appealed to the Florida Supreme Court. On February 23, 1995, the Florida Supreme Court remanded the case for an evidentiary hearing on Mr. Harvey's claims that Trial Counsel was ineffective by: (1) conceding Mr. Harvey's guilt to first-degree murder when counsel attempted to concede only second-degree murder; and (2) failing to discover compelling mental health mitigation evidence. (Pet. App. C, 44a-46a.) The Florida Supreme Court, however, held that Trial Counsel was not ineffective by leaving a biased juror on the jury.

After a six-day evidentiary hearing on remand, the Florida trial court again denied post-conviction relief.

2. The Florida Supreme Court's 2003 ruling granting Mr. Harvey a new trial.

Mr. Harvey appealed to the Florida Supreme Court, arguing that Trial Counsel was ineffective by: (1) conceding Mr. Harvey's guilt to first-degree murder even though he only intended to concede second-degree murder and did so without disclosing any concession strategy to Mr. Harvey; and (2) failing to investigate Mr. Harvey's mental health history even though there were "red flags" that strongly suggested Mr. Harvey suffered from several mental illnesses.

On July 3, 2003, the Florida Supreme Court granted Mr. Harvey a new trial (both guilt and penalty phase), finding that Trial Counsel was ineffective by systematically conceding Mr. Harvey's guilt to first-degree murder without Mr. Harvey's consent. (Pet. App. B, 35a.) The court did not

reach any other issues raised by Mr. Harvey, including Trial Counsel's failure to investigate mental health mitigation.

3. The Florida Supreme Court's revised opinion denying Mr. Harvey post-conviction relief.

On July 18, 2003, the State moved for rehearing. While the State's motion was pending, this Court decided *Florida v. Nixon*. On June 15, 2006, the Florida Supreme Court, misinterpreting *Nixon*, issuing a revised ruling, reversing its decision granting Mr. Harvey a new trial. (Pet. App. A, 1a-24a.) The Florida court also, for the first time, considered Mr. Harvey's claim that Trial Counsel failed to investigate mitigation evidence, refusing to grant Mr. Harvey a new sentencing hearing even though Trial Counsel's lack of investigation was unreasonable under this Court's decisions in *Wiggins v. Smith* and *Rompilla v. Beard*.

On June 30, 2006, Mr. Harvey filed a motion for rehearing. On January 8, 2007, the Florida Supreme Court denied that motion. (Pet. App. F, 67a.)

VII. STATEMENT OF THE CASE.

Mr. Harvey's defense was the first capital case for Trial Counsel as first chair, and Trial Counsel made a series of errors that denied Mr. Harvey effective assistance of counsel.

A. Trial Counsel Failed To Excuse An Admittedly Biased Juror.

Because of the pre-trial publicity involving this case, the trial court permitted individual, sequestered voir dire of all potential jurors who indicated they had read or heard about the case. One potential alternate juror, Marlene Brunetti

("Juror Brunetti"), was called for voir dire. In voir dire, Juror Brunetti admitted that she had seen information about Mr. Harvey's case in the news, including that Mr. Harvey had confessed to his involvement. (Pet. App. H, 71a-77a.) When asked if she could be impartial, she candidly admitted, "I don't think I could be impartial after reading about it." (*Id.* at 74a-75a.) Juror Brunetti later affirmed that she could not be impartial because she felt "he committed the crime that he was charged for." (*Id.* at 78a.) She also admitted, "I can't honestly say that I could have an open mind after reading it and seeing it on the news. I have to be honest." (*Id.* at 79a.)

Trial Counsel did not move to strike Juror Brunetti, despite numerous invitations from the trial court to do so. (*Id.* at 80a.) For example, after voir dire, the court asked:

Court:	Just so I understand, there is not motions (sic) for cause that have been made at this time?
Defense Counsel:	No.

The following morning, the court excused a juror for medical reasons and Juror Brunetti was the first alternate. The court again asked if there was any objection to seating this admittedly biased juror. (*Id.* at 82a.) Trial Counsel did not object. As a result, Juror Brunetti, who testified she could not be fair and impartial, served on the jury that convicted and sentenced Mr. Harvey to death. There was no evidence in the record that Mr. Harvey waived his right to an impartial jury.

The Florida Supreme Court rejected Mr. Harvey's that Trial Counsel was ineffective in failing to strike Juror Brunetti. The court found that defense counsel could unilaterally make a strategic choice to have his client's cased

decided by a panel including a resolutely biased and partial juror. (Pet. App. C, 43a-44a.)

B. Trial Counsel Conceded Guilt To First-Degree Murder Without Consultation Or Consent.

Trial Counsel's strategy for the guilt phase of this case was to "tip-toe" through Florida case law and concede Mr. Harvey's guilt to second-degree murder, with the hope he could avoid a first-degree conviction, and convince the jury to spare Mr. Harvey's life. In making this decision, Trial Counsel did not advise Mr. Harvey of his plan to concede second-degree murder until seconds before he delivered his opening statement to the jury, while sitting at counsel table in the courtroom, in a whispered one-way exchange. (PCR. v. 10, pp. 105-06.) There was no opportunity for Mr. Harvey to reflect, discuss or evaluate Trial Counsel's plan to concede guilt.

Trial Counsel bungled his own approach and conceded all of the elements of first-degree, capital murder and admitted numerous aggravating factors that supported imposition of the death penalty. Trial began on June 13, 1986. The court instructed the jury that Mr. Harvey had entered a plea of "not guilty" and must be presumed innocent until proven guilty. The government opened its case. Trial Counsel then stood and addressed the jury. His first words were:

> Harold Lee Harvey is guilty of murder. If anything is established over the next week it will be that Harold Lee Harvey is guilty of murder. (R. 1859.)

Trial Counsel continued his opening statement with more concessions. He conceded felony murder by telling the jury, "this case is the story of a robbery, a robbery that went very badly." (R.1861.) Trial Counsel conceded premeditation: "without question what was discussed during this conversation was whether or not to kill these two people." (R. 1864.) Trial Counsel made other inappropriate concessions and remarks:

> And then it [the murders] happened just about the way that Mr. Morgan [State's Attorney] said it did [in his opening statement]. (R. 1863.)
>
> * * *
>
> When evil gets set in motion one thing leads to another. (R. 1864.)
>
> * * *
>
> And then as part of the complete disintegration of this plan Lee went back inside to pick up the shells, the brass shells. (R. 1865.)

Trial Counsel made similar concessions during his guilt phase closing argument. For example, he conceded: "The evidence supports a shooting with premeditation, with a conscious decision to kill." (R. 3030-31.) He went so far as to tell the jury the Boyds' deaths occurred in the course of a kidnapping, an uncharged crime. (R. 1863, 3027.) He made numerous other inappropriate remarks, including:

> Lee shot Mr. and Mrs. Boyd and killed them. (R. 2460.)
>
> * * *
>
> I would say that burglary was committed there. (R. 2469-70.)
>
> * * *
>
> You may even say that they had decided to commit the murder at the time of the shooting. (R. 2472.)

Mr. Harvey did not consent privately or on the record to any strategy to concede to second-degree murder or even have the opportunity to do so. (PCR v. 15, p. 933.) Instead, Trial Counsel disclosed his approach in the seconds before opening statements. No discussion of any kind was had about conceding to first-degree murder, numerous aggravating factors or crimes not even charged.

In its 2003 opinion, the Florida Supreme Court found that Trial Counsel wrongfully conceded all the elements of guilt to first-degree murder and granted Mr. Harvey a new trial. (Pet. App. B, 35a.) On June 15, 2006, however, the court, relying on *Nixon*, reversed its initial decision, finding that Trial Counsel acted effectively by conceding Mr. Harvey's guilt to first-degree murder even though his stated goal was to concede second-degree murder only. (Pet. App. A, 9a.)

C. Trial Counsel Failed To Conduct A Reasonable Mitigation Investigation.

1. The "good person" mitigation strategy.

There was no mitigation investigation by Trial Counsel in this case. Trial Counsel made no effort to uncover potential nonstatutory mitigating factors, such as evidence of family health records, substance abuse, trauma, abuse, illness, and life history. (PCR. v. 12, pp. 411-12.) Trial Counsel also directed his investigator not to investigate Mr. Harvey's prenatal care, dysfunctional characteristics in Mr. Harvey's extended families, birth complications, childhood accidents, pediatric medical care, exposure to toxic substances, familial poverty, substance abuse, domestic abuse, mental health problems, suicide attempts or depression. (PCR. v. 13, pp. 763-66.)

Instead, Trial Counsel set upon a "good person" theory and directed his witnesses' efforts to supporting that theory. He told his investigator, for example, to obtain statements from individuals who had "nice" things to say about Mr. Harvey. (*Id.* at 759-63.) Trial Counsel's approach is best illustrated in the notes that Mr. Harvey's father kept, in Trial Counsel's own handwriting, reflecting that he wanted Mr. Harvey's father to state that the Harvey family was good and loving. (Def. Ex. 23; PCR. v. 14, pp. 789-90.)

2. Trial Counsel failed to retain a forensic psychiatrist.

Trial Counsel hired Dr. Fred Petrilla, a grammar school psychologist, to conduct a "personality assessment" of Mr. Harvey in preparation for trial. (PCR. v. 15, p. 959.) At the time, Dr. Petrilla's practice consisted exclusively of counseling teenagers and adolescents. (*Id.* at 963.) Dr.

Petrilla had no training in neuropsychology and had no experience in capital cases. (*Id.* at 964.) Mr. Harvey was only the second criminal defendant he had examined. (*Id.*)

A personality assessment is different from a forensic mental health evaluation. It is oriented towards understanding psychological issues in an individual's personal life and developing a suitable course of counseling. A personality assessment does not include neurological testing designed to determine whether the subject has brain damage or another neurological disorder. Nor does it attempt to relate the subject's mental health in any way to the crime at issue.

Dr. Petrilla conducted the personality assessment of Mr. Harvey over a few hours. (PCR. v. 15, p. 960-61.) He concluded that Mr. Harvey was insecure, suffered from low self-esteem, was anxious, depressed, had low intelligence and lacked social skills. (Def. Ex. 11.) Although Mr. Harvey was facing the possibility of a death sentence, Dr. Petrilla's recommended treatment was for Mr. Harvey to commence self-esteem counseling and assertiveness training. (*Id.*)

Dr. Petrilla recommended several specific psychiatrists to Trial Counsel because the preliminary tests given to Mr. Harvey indicated potential organic brain damage, and because he had no experience in neuropsychology and forensic examination. On February 22, 1986, following up on that recommendation, Trial Counsel prepared a "Memo to File" to remind himself to retain a psychiatrist: "I need to get a hold of a psychiatrist to examine Mr. Harvey." (Pet. App. I, 83a.) Dr. Petrilla also telephoned Trial Counsel with other recommendations of specific psychiatrists. (Pet. App. J, 84a; PCR. v. 10, pp. 81-82.)

Trial Counsel took some steps to retain a psychiatrist, but ultimately failed to do so. For example, Trial Counsel filed a Motion to Adopt the motion by Mr. Harvey's co-defendant requesting authorization to retain *both* a *psychiatrist and psychologist*. (Def. Ex. 2.) As Trial Counsel specifically adopted, "[i]t is necessary to have both the psychiatric examination and the psychological examination in order to receive a total picture of the defendant's total condition at the time of the alleged offense." (Def. Ex. 2; PCR. v. 10, pp. 76-77.)

The court granted Trial Counsel's motion. (PCR. v. 10, p. 80.) Trial Counsel thereafter represented to the court time and time again that he planned to retain a psychiatrist. For example, on January 16, 1986, Trial Counsel moved to postpone the penalty phase on grounds that he would move for a psychiatric evaluation prior to the penalty phase. (PCR. v. 10, pp. 78-79.) On February 18, 1986, Trial Counsel moved the court to increase professional mental health fees so that he could obtain a psychiatrist for Mr. Harvey. (*Id.* at 79-80.) The court approved the request. (*Id.* at 80.)

Trial Counsel, however, never retained a psychiatrist.

3. Mr. Harvey's mental illnesses.

At the hearing on his post-conviction motion, Mr. Harvey called Dr. Michael Norko, Dr. Brad Fisher and Dr. Petrilla. Their un-rebutted testimony demonstrated the mental health evidence Trial Counsel missed.

Dr. Norko has held positions as director and chief executive officer of the Whiting Forensic Institute in Connecticut, director of River Valley Mental Health Services in Connecticut, and as a private psychiatrist. Dr. Norko also has held a teaching position in psychiatry at the Yale

University School of Medicine for ten years. He is a Rappaport Fellow of the American Academy of Psychiatry & Law and a fellow of the American Psychiatric Association. (PCR. v. 11, pp. 261-68.)

Dr. Norko testified about the mitigating evidence a psychiatrist could have offered at Mr. Harvey's trial if Trial Counsel had retained a psychiatrist. Dr. Norko testified that Mr. Harvey suffered from four mental illnesses at the time of the 1985 crime: (1) Organic Brain Dysfunction, consistent with both frontal lobe and brain stem damage; (2) Major Depressive Disorder; (3) Post-Traumatic Stress Disorder; and (4) Substance Abuse Disorders related to Mr. Harvey's long-term drug and alcohol abuse. (*Id.* at 290.)

Clinically, Dr. Norko diagnosed Mr. Harvey with post-concussion syndrome and significant personality change. (*Id.* at 297-98, 304-05.) Mr. Harvey's post-concussion syndrome manifested itself through repeated head injuries that had a cumulative effect, including a 1979 car accident that claimed a girl's life and critically injured Mr. Harvey, loss of consciousness, amnesia, headaches, decreased attention, staring into space, memory problems, emotional changes, depression and insomnia. (*Id.* at 298-03.)

Dr. Norko also observed a significant personality change after Mr. Harvey's 1979 car accident. (*Id.* at 304.) Those personality changes included decreased attention, affective liability, irritability, a sudden changing of expressed emotion or mood for no apparent reason, depression, a reckless or apathetic attitude, staring into space, intolerance at being touched, excessive interpersonal withdrawal, hopelessness, and increased drug and alcohol use. (*Id.* at 304-08.) Mr. Harvey's organic brain damage could cause him to respond quickly and suddenly in an unprovoked manner to

stimulus around him, develop rages or irritability, and explode into sudden violent behavior. (PCR. v. 12, p. 437.)

Dr. Norko confirmed his clinical conclusions about Mr. Harvey's organic brain dysfunction with Mr. Harvey's psychological test results. For example, Mr. Harvey's scores on his IQ test showed a 12 point difference between his verbal and performance scores. (PCR. v. 11, p. 310.) A difference of 10 points or more indicates organic brain damage. (*Id.*) Dr. Norko also examined the raw data of Mr. Harvey's responses to the Halstead-Reitan trail making test and the WAIS-R test, both of which indicated organic brain damage. (*Id.* at 316-17.) Finally, Dr. Norko found that Mr. Harvey's psychological test responses indicated problems with abstract thinking and executive functions, which are higher level brain functions attributed to the frontal lobes. (*Id.* at 315-16.) Executive functions affect an individual's organization, insight, foresight into planning, decision making and behavior. (*Id.* at 316.)

Based on these findings, Dr. Norko testified that the following three statutory mitigating factors were present at the time of the offense: (1) Mr. Harvey lacked the capacity to appreciate the criminality of his conduct or conform his conduct to the requirements of law due to his organic brain dysfunction, impaired executive functions, depression, hyper arousal or impulse-control problems due to Post-Traumatic Stress Disorder, Dependent Personality Disorder, and intoxication at the time of the crime (PCR. v. 12, pp. 435-44); (2) Mr. Harvey acted under the substantial duress or domination of his co-defendant (*id.* at 444-51); and (3) Mr. Harvey committed the offense under the influence of an extreme mental or emotional disturbance, namely his Organic Brain Dysfunction, Major Depressive Disorder, Post-Traumatic Stress Disorder, and Substance Abuse Disorders (PCR. v. 11, p. 292, v. 12, pp. 434, 451-59).

Dr. Norko's psychiatric findings were confirmed by Dr. Brad Fisher, a forensic psychologist who has taught at Duke University and the University of North Carolina. Dr. Fisher testified that "any psychologist" would recognize head injury (such as Mr. Harvey's 1979 car accident and after being hit with a tire iron) as significant "red flags" of organic brain damage. (*Id.* at 663-64.) Among other things, Dr. Fisher found evidence of organic brain damage in Mr. Harvey's responses to two psychological tests (*id.* at 665-67), and confirmed Dr. Norko's conclusions that Mr. Harvey suffers from several mental illnesses, including organic brain damage and that Mr. Harvey's mental health would have established three statutory mitigators. (*Id.* at 659-61.)

Dr. Petrilla, the grammar school psychologist who testified at the initial trial, testified for a second time at the post-conviction hearing pursuant to subpoena. Since the initial trial, Dr. Petrilla has received training in neuropsychology and become board certified. At risk to his professional reputation and standing, Dr. Petrilla testified that he erred in his interpreting or scoring of Mr. Harvey's responses to the psychological tests he administered in 1986. Indeed, Dr. Petrilla further admited that his 1986 conclusion that Mr. Harvey did not suffer from organic brain damage was the product of his lack of "competence in that area." (PCR. v. 15, p. 972, 990.)

Drs. Norko, Fisher and Petrilla's testimony is unrebutted. It shows unequivocally that Mr. Harvey has organic brain damage, a disability that should have been discovered and considered by Trial Counsel before any decisions were made about an approach to Mr. Harvey's defense. Trial Counsel failed to do so, and that failure impacted every phase of the initial trial from the pre-trial arguments used to challenge Mr. Harvey's statements to police and other evidence, any decision to forfeit

constitutional rights, the approach used in addressing the jury, and in all other phases of the trial.

Nevertheless, the Florida Supreme Court found that Trial Counsel was not ineffective for failing to investigate because the mental health evidence was inconsistent with Trial Counsel's uninformed "good person" approach. (Pet. App. A, 16a-17a.)

VIII. REASONS FOR GRANTING THE WRIT.

This Court should grant review for three reasons. *First*, a significant split in authority exists amongst lower courts on whether a trial counsel's failure to strike a self-described biased juror can ever be a reasonable strategic decision under *Strickland v. Washington*, and if not, whether prejudice should be presumed in such cases of error. *Second*, the Florida Supreme Court has misinterpreted this Court's recent decision in *Florida v. Nixon* as providing capital trial counsel the unfettered discretion to concede a defendant's guilt without obtaining a defendant's consent to that strategy. *Finally*, the Florida Supreme Court has failed to apply this Court's recent holdings in *Wiggins v. Smith* and *Rompilla v. Beard* by failing to determine whether Trial Counsel first made a reasonable investigation into mitigating circumstances before adopting a penalty phase strategy.

A. This Court Should Resolve A Lower Court Split On Whether Counsel's Failure To Strike A Biased Juror Constitutes Ineffective Assistance.

Although Mr. Harvey never waived his right to an impartial jury, Trial Counsel repeatedly failed to excuse a juror who candidly admitted she could not be impartial or keep an open mind. (Pet. App. H, 80a, 82a.) On Mr. Harvey's claim for post-conviction relief, the Florida

Supreme Court incorrectly concluded that Trial Counsel made a strategic decision to accept that juror. (Pet. App. C, 43a-44a.)

The Florida Supreme Court's incorrect ruling conflicts with the Sixth Amendment as well as this Court's holdings in *Strickland* and *United States v. Cronic*. That decision also is contrary to the holdings of other state and federal courts and part of an increasing split in authority as to whether counsel (rather than the client) can decide to accept a biased juror.

1. Counsel was deficient by failing to strike an admittedly biased juror.

The Sixth Amendment guarantees an accused the right to the assistance of counsel and trial by an impartial jury. *Strickland v. Washington*, 466 U.S. 668, 685 (1984). "[T]he right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, 'indifferent' jurors." *Irvin v. Dowd*, 366 U.S. 717, 722 (1961) (reversing conviction where widespread and inflammatory publicity had preceded the trial even though jurors insisted they would remain impartial); *see also Murphy v. Florida*, 421 U.S. 794, 799 (1975); *Ross v. Oklahoma*, 487 U.S. 81, 86 (1988).

Counsel cannot waive a client's Sixth Amendment right to an impartial jury without consent. *Taylor v. Illinois*, 484 U.S. 400, 417-18 n.24 (1988) ("there are basic rights that the attorney cannot waive without the fully informed and publicly acknowledged consent of the client" including the right to a jury trial). Voir dire is an essential part of guaranteeing a criminal defendant's right to a fair and impartial jury. *Rosales-Lopez v. United States*, 451 U.S. 182, 188 (1981). Without adequate voir dire, the trial judge's responsibility to remove prospective jurors who will not be

impartial and follow the court's instructions cannot be fulfilled. *Id.*

An impartial tribunal is an indispensable element of a fair criminal trial. *Id.* at 196 (Stevens, J. dissenting). In the language of Lord Coke, a juror must be "indifferent as he stands unsworne." *See Smith v. Phillips*, 455 U.S. 209, 225 n.2 (1982) (Marshall, J. dissenting). The failure to accord an accused a fair and impartial jury violates even the minimal standards of due process. *Irvin*, 366 U.S. at 722; *In re Oliver*, 333 U.S. 257, 278 (1948); *Tumey v. Ohio*, 273 U.S. 510, 523 (1927).

A defendant's right to an impartial jury is primarily implemented through the system of challenges exercised during the voir dire of prospective jurors. *United States v. Nell*, 526 F.2d 1223, 1229 (5th Cir. 1976). "Challenges for cause are the means by which partial or biased jurors should be eliminated." *United States v. Gonzalez*, 214 F.3d 1109, 1111 (9th Cir. 2000). The right to challenge a juror for bias dates back to the days of Blackstone. *See* 3 W. Blackstone, Commentaries 480-81 (W. Hammond ed. 1890).

As the Sixth Circuit has held, the "question of whether to seat a biased juror is not a discretionary or strategic decision." *Hughes v. United States*, 258 F.3d 453, 463 (6th Cir. 2001). "If counsel's decision not to challenge a biased venireperson could constitute sound trial strategy, then sound trial strategy would include counsel's decision to waive, in effect, a criminal defendant's right to an impartial jury." *Id.*

Although Trial Counsel utterly failed to preserve Mr. Harvey's right to an impartial jury, the Florida Supreme Court concluded that his decision to accept a juror who admitted she could not be impartial was a reasonable strategic decision. That decision is wrong and deprives Mr.

Harvey of his right to a trial by a fair and impartial jury, a fundamental Constitutional right that was never waived by him in this case.

2. Prejudice should be presumed because the presence of the biased juror rendered the trial presumptively unreliable.

While a defendant claiming ineffective assistance typically must show prejudice, this Court has held there are "circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified." *United States v. Cronic*, 466 U.S. 648, 658 (1984). For example, this Court has held that prejudice should be presumed where a defendant was "denied the right of effective cross-examination" which "would be constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it." *Davis v. Alaska*, 415 U.S. 308, 318 (1974) (internal quotation omitted).

The mere presence of a biased juror taints a trial's outcome to the point that a court must find prejudice exists. Indeed, several federal courts of appeal and state courts have correctly concluded that counsel's failure to strike a biased juror is an unreasonable "strategic decision" and have held that the outcome of the trial is presumptively unreliable. *Hughes*, 258 F.3d at 463; *Gonzalez*, 214 F.3d at 1111 (same); *Miller v. Webb*, 385 F.3d 666, 676 (6th Cir. 2004) (presuming prejudice when counsel leaves a partial juror on the jury); *State v. King*, 144 P.3d 222, 225 (Utah Ct. App. 2006) (same).

This Court's guidance is necessary, not just to correct the Florida Supreme Court's unconstitutional decision, but also to resolve an existing split amongst lower courts.

Indeed, some courts, like the Fifth, Tenth and Eighth Circuits, have held that counsel is deficient when he leaves a biased juror on the jury, but require a showing of actual prejudice. *Virgil v. Dretke*, 446 F.3d 598, 612 (5th Cir. 2006); *Hale v. Gibson*, 227 F.3d 1298, 1319 (10th Cir. 2000); *Johnson v. Armontrout*, 961 F.2d 748, 755-56 (8th Cir. 1992); *see also State v. Terry*, 601 So. 2d 161, 164 (Ala. Crim. App. 1992). Other courts have held that counsel can make a reasonable strategic decision to leave a biased juror on the jury. *Delrio v. State*, 840 S.W.2d 443, 447 (Tex. Crim. App. 1992) (counsel made strategic decision to accept biased juror); *Hightower v. State*, 43 S.W.3d 472, 477 (Mo. App. 2001) (same); *People v. Metcalfe*, 782 N.E.2d 263, 274-75 (Ill. 2002) (same).

Lower state and federal courts are divided. This Court should resolve this split, hold that counsel alone cannot decide to accept a biased juror, instruct lower courts that prejudice should be presumed where counsel fails to remove a biased juror and grant Mr. Harvey a new trial.

B. This Court Should Grant Review To Correct The Florida Supreme Court's Fundamental Misapplication Of *Nixon*.

In its original ruling, the Florida Supreme Court found that Trial Counsel was *per se* ineffective under *Cronic* because he failed to obtain Mr. Harvey's consent to admit guilt at trial and had undermined his own strategy to concede second-degree murder only and consequently, ordered a new trial. (Pet. App. B, 35a.) In its revised opinion, the court again agreed that Trial Counsel botched his strategy and inadvertently conceded Mr. Harvey's guilt to first-degree murder. (Pet. App. A, 7a.) Nevertheless, the court reversed itself and concluded that this Court's decision in *Nixon* stands for the proposition that "a defendant's claim of

ineffective assistance of counsel based on counsel's concession of guilt to the crime charged, even without the defendant's consent" must be evaluated under the standard set forth in *Strickland.* (Pet. App. A,. 4a.)

This Court should correct the Florida Supreme Court's fundamental misapplication of *Nixon* for two reasons. First, this Court should clarify that *Nixon* does not allow counsel to concede guilt without first consulting his client. Second, this Court should clarify that *Nixon* does not preclude a court from presuming prejudice where (as here) counsel spectacularly undermines his own strategy.

1. This Court should dispel the myth that counsel can concede guilt without first consulting the client.

Nixon involved a set of circumstances that were far different from those here. In *Nixon*, trial counsel met with the defendant at least three times to discuss counsel's strategy to concede guilt and focus instead on convincing the jury not to impose death. *Florida v. Nixon*, 543 U.S. 175, 189 (2004). Nixon was unresponsive during those discussions and never verbally approved or rejected counsel's proposed strategy. *Id.* Faced with Nixon's unresponsiveness, counsel concluded that the best strategy was to concede guilt and preserve his credibility in urging leniency during the penalty phase. *Id.*

After reaffirming that defense counsel "undoubtedly has a duty to consult with the client," this Court held that "when a defendant, informed by counsel, neither consents nor objects to the course counsel describes as the most promising means to avert a sentence of death, counsel is not automatically barred from pursuing that course." *Id.* at 178. However, this Court made clear that a defendant's right to

decide whether to concede guilt was not completely eviscerated and that counsel indisputably has a duty to consult his client as to any concession strategy. *Id.* at 187. This Court re-emphasized that its holding was limited to the particular facts of the case before it: "[w]hen counsel informs the defendant of the strategy counsel believes to be in the defendant's best interest and the defendant is unresponsive, counsel's strategic choice is not impeded by any blanket rule demanding the defendant's explicit consent." *Id.* at 192.

Mr. Harvey's case is fundamentally different from *Nixon* because Trial Counsel deprived Mr. Harvey of his right to consent or object to counsel's strategy. Mr. Harvey never had the opportunity to consent to Trial Counsel's approach to conceding guilt. By failing to disclose his strategy to Mr. Harvey, Trial Counsel completely deprived Mr. Harvey of the opportunity to consider that strategy, and consequently, Trial Counsel was deficient. *Nixon*, 543 U.S. at 189; *Strickland*, 466 U.S. at 688. *See also* JESSICA M. TANNER, Note, Florida v. Nixon 125 S. Ct. 551 (2004), 17 Cap. Def. J. 421, 426-27 (2005) (*Nixon* did not reach the issue of whether counsel is ineffective under *Strickland* or *Cronic* if counsel did not consult with the client before conceding guilt).

This Court should grant review and hold that where (as here) counsel does not disclose a concession strategy to his client, *Cronic* applies and prejudice should be presumed.

2. This Court should hold that where counsel undermines his own strategy and concedes guilt, prejudice should be presumed.

As the Florida Supreme Court conceded, Trial Counsel spectacularly botched his strategy to argue for second-degree murder. (Pet. App. A, 7a.) Although Trial Counsel believed he could "tiptoe through Florida case law" and make an

argument for second-degree murder while still conceding Mr. Harvey's guilt, Trial Counsel stepped on a landmine with his very first step and conceded Mr. Harvey's guilt to first-degree murder in his opening statement.

In *Nixon*, this Court rejected Nixon's argument that counsel's strategy to concede guilt was the "functional equivalent" of a guilty plea because "Nixon retained the rights accorded a defendant in a criminal trial." 543 U.S. at 188. This Court reasoned that the State still was obliged to present competent, admissible evidence to prove the essential elements of first-degree murder, the defense reserved the right to cross-examine witnesses and could endeavor to exclude prejudicial evidence. *Id.*

This Court did not reach the issue of whether Nixon was prejudiced by counsel's strategy. Nor did this Court hold that prejudice could not be presumed in cases where counsel "fail[s] to function in any meaningful sense" as the State's adversary. *Id.* at 190. Indeed, *Nixon* necessarily suggests that prejudice still must be presumed when counsel fails to act as an adversary of the government because the "trial" then becomes closer to a "functional equivalent" of a guilty plea. *Id.* That is precisely what happened here.

This case is significantly different from *Nixon* in at least one critical respect. In *Nixon*, counsel's strategy was to concede first-degree murder (not argue for second-degree) and focus his efforts on persuading the jury to spare Nixon's life, and counsel consistently implemented that strategy throughout the trial. For example, Nixon's counsel urged the jury to focus on the penalty phase: "I'm suggesting to you that . . . there are going to be reasons why you should recommend that his life be spared." *Nixon*, 543 U.S. at 183. That is not what happened here where Trial Counsel

undermined his own strategy and failed to function as the government's adversary.

Trial Counsel completely failed to function as the government's adversary in defending Mr. Harvey by systematically conceding Mr. Harvey's guilt to first-degree murder, including aggravating factors that were found nowhere in Mr. Harvey's statements. Although he was trying to concede only second-degree murder, Trial Counsel argued that Mr. Harvey killed the Boyds both with premeditation and in the course of a burglary or robbery.

As to premeditation, he told the jury that Mr. Harvey and Mr. Stiteler "put together a plan . . . that [ ] was going to be foolproof" and they discussed "whether or not to kill these two people." (R. 1861-64.) He also conceded the two had formed the intent to kill when they "decided to commit the murder at the time of the shooting." (R. 2472.)

As to felony murder, he told the jury "this case is the story of a robbery, a robbery that went very badly" and that "I would say that burglary was committed there." (R. 1861, 2469-70.) He then emphasized to the jury that the commission of those crimes was important because "the judge will instruct you that for felony murder it must be proved beyond a reasonable doubt that the person was either engaged in one of the felonies that he will describe, robbery, burglary, and kidnapping is the third one -- either engaged in it or escaping from it." (*Id.*) For good measure, he even conceded that the State's description of how Mr. Harvey killed the Boyds was correct. (R. 3027.)

This case is not *Nixon*, where counsel's strategy was to concede guilt to first-degree murder and focus his efforts entirely on the penalty phase and implemented that strategy throughout the trial. Here, Trial Counsel implemented an

entirely different strategy -- to "tiptoe" through Florida case law and focus the jury on second-degree murder -- and conceded every element of first-degree murder and the aggravating factors needed to impose death. The government did not need to prove anything because counsel had already conceded, without authorization, every aspect of the government's case. By making these repeated concessions while arguing for second-degree murder, Trial Counsel fell into the very trap *Nixon* reasoned was a valid justification for conceding guilt -- to gain credibility with the jury. Trial Counsel failed to function as a meaningful adversary to the State, and prejudice should be presumed.

C. The Florida Supreme Court's Holding That Trial Counsel Conducted An Adequate Mitigation Investigation Conflicts With this Court's Decisions In *Strickland* And Its Progeny.

By adopting his "good person" mitigation strategy, Trial Counsel missed critical and persuasive mitigation evidence regarding Mr. Harvey's mental health. The unrebutted testimony of two psychiatrists, Dr. Norko and Dr. Fisher, showed that Mr. Harvey suffers from many mental illnesses, including organic brain damage and post-traumatic stress syndrome. (*See supra* at 11-15.) The evidence also showed that Trial Counsel's own expert, Dr. Fred Petrilla, recommended that Trial Counsel retain a forensic psychiatrist and provided him with multiple recommendations. (Pet. App. J, 84a.) Trial Counsel even wrote a note to file showing he understood the importance of retaining a psychiatrist: "I need to get a hold of a psychiatrist to examine Mr. Harvey." (*Id.*; PCR. v. 10, pp. 82.) Inexplicably, Trial Counsel never followed through.

The Florida Supreme Court, however, concluded that Trial Counsel's failure to investigate Mr. Harvey's mental

health was a strategic decision because the evidence of Mr. Harvey's mental illnesses was inconsistent with Trial Counsel's "good person" mitigation strategy. (Pet. App. A, 16a.) That holding is contrary to this Court's rulings in *Wiggins* and *Rompilla*, and although the Florida Supreme Court never reached the prejudice prong of *Strickland*, Mr. Harvey was undoubtedly prejudiced by Trial Counsel's decision to latch on to a good person mitigation strategy before even *beginning* his investigation.

1. Trial Counsel's investigation was deficient.

Criminal defense "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland v. Washington*, 466 U.S. 668, 691 (1984); *Wiggins v. Smith*, 539 U.S. 510, 521 (2003); *Rompilla v. Beard*, 545 U.S. 374, 375 (2005). Indeed, this Court has cautioned time and again: "strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." *Wiggins*, 539 U.S. at 528 (quoting *Strickland*, 466 U.S. at 690-91). "[C]ounsel has a duty to make *reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary*." *Strickland*, 466 U.S. at 691 (emphasis added). A strategic decision must flow from an informed decision. *Id.*

A court considering the reasonableness of an attorney's partial investigation must consider "not only the quantum of evidence already known to counsel, *but also whether the known evidence would lead a reasonable attorney to investigate further*." *Wiggins*, 539 U.S. at 527 (emphasis added). Counsel is deficient if he chooses "to abandon [his] investigation at an unreasonable juncture, making a fully informed decision with respect to sentencing strategy

impossible." *Id.* at 527-28. Thus, capital counsel cannot make a reasonable strategic decision about a mitigation case when counsel has not first made a reasonable investigation to determine his options for putting on that mitigation case. *Wiggins*, 539 U.S. at 521; *Strickland*, 466 U.S. at 691. Instead, counsel must make a thorough investigation before making any decision regarding the mitigation strategy. *Wiggins*, 539 U.S. at 521; *Strickland*, 466 U.S. at 691. A reviewing court should be especially critical of counsel's investigation if counsel's investigation adduced "red flags" that suggested counsel should continue his investigation. *Rompilla*, 545 U.S. at 392.

Following *Wiggins* and *Rompilla*, other lower courts have found that counsel's mitigation evidence investigation was deficient on circumstances that are virtually identical to those here. For example, the Ninth Circuit recently held that counsel "abandoned their [mental health] investigation at an unreasonable juncture" where (as here) the record revealed: (i) counsel believed defendant may have suffered from a mental illness; (ii) a preliminary mental health examination indicated a probability that defendant suffered from schizophrenia and paranoia; and (iii) counsel nevertheless did not "follow up on these important leads by seeking a comprehensive evaluation by more qualified and experienced practitioners." *Daniels v. Woodford*, 428 F.3d 1181, 1203-04 (9th Cir. 2005); *Commonwealth v. Gorby*, 909 A.2d 775, 791 (Pa. 2006) (counsel knew defendant suffered from a head injury and substance abuse).

The Florida Supreme Court ignored this Court's directives. Rather than focus on the reasonableness of Trial Counsel's investigation, the Florida Supreme Court focused solely on whether his decision to *not* investigate was consistent with his strategy to present Mr. Harvey as a "good person." (Pet. App. A, 16a); *compare Rompilla*, 545 U.S. at

391 ("The accumulated entries would have destroyed the benign conception of Rompilla's upbringing and mental capacity defense counsel had formed from talking with Rompilla himself and some of his family members, and from the reports of the mental health experts."). The Florida Supreme Court's improper focus on whether evidence of Mr. Harvey's mental health issues was consistent with Trial Counsel's "good person" strategy was a wholly unreasonable application of *Strickland*, *Wiggins* and *Rompilla* and can only be described as a *post-hoc* rationalization of Trial Counsel's inattentiveness. If the Florida Supreme Court *had* looked at whether Trial Counsel made a reasonable decision to stop his investigation into mitigating evidence, the court easily would have concluded that Trial Counsel's investigation was unreasonable for at least two reasons.

First, Trial Counsel adopted a "good person" strategy before conducting, much less completing, a reasonable mental health investigation under the circumstances, and in contravention of his own mental health expert advising him that a psychiatric evaluation was necessary. Not only did Dr. Petrilla tell Trial Counsel to hire a psychiatrist, the trial court authorized and approved funds for that purpose. (PCR. v. 10, p. 80.) Like the ineffective counsel in *Rompilla*, who failed, *inter alia*, to seek information that was "readily available for the asking," Trial Counsel failed to retain a psychiatrist obtainable to Mr. Harvey at no charge. *See Rompilla*, 545 U.S. at 384. Trial Counsel's decision to stop his investigation without psychiatric evaluation when he had funds available for the evaluation was unreasonable.

Trial Counsel failed to recognize other red flags that indicated a mental health investigation was necessary. For example, Trial Counsel knew Mr. Harvey had suffered head trauma in a car accident, knew Mr. Harvey was once hit in the head with a tire iron, and had Mr. Harvey's medical

records. (PCR. v. 13, p. 595.) In fact, Trial Counsel admitted at the evidentiary hearing that he had concerns about Mr. Harvey's competency. (PCR. v. 10, pp. 86-87.)

Second, had the Florida Supreme Court examined whether Trial Counsel's failure to investigate Mr. Harvey's mental health was reasonable, it would have found Trial Counsel's failure to investigate was the result of his own inattention. *See Wiggins*, 539 U.S. at 526. Trial Counsel prepared a "Memo to File" to remind himself to retain a psychiatrist. He asked the court for an extension of time to hire a psychiatrist. Trial Counsel's inattentiveness is underscored by his testimony that he would have presented evidence of organic brain dysfunction if he had known about it. Trial Counsel's failure to investigate because of his inattention is not a strategic decision. *See id.* at 526.

The Florida Supreme Court's finding that Trial Counsel fulfilled his duties under *Strickland*, *Wiggins* and *Rompilla* is patently unreasonable. This Court should grant certiorari review to correct the Florida Supreme Court's misguided analysis under *Strickland* and *Wiggins*.

2. Trial Counsel's deficient performance prejudiced Mr. Harvey.

Although the Florida Supreme Court never reached *Strickland*'s prejudice prong, the fact that Mr. Harvey was prejudiced by Trial Counsel's deficient performance is plainly apparent, and Trial Counsel's failure to conduct a mental health investigation infected Mr. Harvey's entire trial. Indeed, even Trial Counsel admitted he would have used this evidence if he knew it existed. (PCR. v. 12, p. 389.)

To establish prejudice, a defendant must show that there is a reasonable probability that, but for counsel's

unprofessional errors, the result of the proceeding would have been different. *Wiggins*, 539 U.S. at 534, *Strickland*, 466 U.S. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. In assessing prejudice, a court reweighs the evidence in aggravation against the totality of available mitigating evidence. *Wiggins*, 539 U.S. at 534. Based on the powerful mitigation evidence discovered by post-conviction counsel, there is no question that the evidence of Mr. Harvey's psychiatric disorders would have led to a different sentencing result.

At the initial trial, the court balanced four aggravating factors, no statutory mitigating factors, and only two comparably weak non-statutory mitigators (low IQ and poor social/educational skills). Because of Trial Counsel's mistakes, the jury also heard *nonstatutory aggravating* evidence -- lack of remorse and post-crime criminal conduct -- along with a weak nonstatutory mitigating circumstance of low educational and social skills. That balance would have shifted markedly if Trial Counsel had done a proper investigation. Mr. Harvey could have established reasonable doubt on all but one statutory aggravating factor (murder committed during commission of a burglary).[2]

On the other hand, the jury would have found uncontroverted expert evidence of three statutory mitigating

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[2] As to the HAC aggravator, Mr. Harvey could present evidence that the victims were very hard of hearing and the conversation about them took place out of earshot and amidst a running car engine. (Def. Ex. 5.) As to the CCP aggravator, Dr. Norko's testimony shows the crimes were the product of a snap, accidental reaction caused by the confluence of Mr. Harvey's hyperarousal syndrome with the victims' sudden attempt to run. (PCR v. 12, p. 440.) Similarly, because the shooting was a reflexive act, Mr. Harvey could raise reasonable doubt on the factor that the murders were committed to prevent lawful arrest.

factors: Mr. Harvey lacked the ability to conform his conduct to the requirements of law, he acted under the substantial domination of another, and he committed the offense under the influence of extreme mental or emotional disturbance, namely his organic brain damage. The jury also would have found non-statutory mitigating factors of family dysfunction, poverty, abuse, head traumas, suicide attempts and substance abuse. Further, if this Court ordered a new penalty phase and Mr. Harvey's re-sentencing were held under today's law, Mr. Harvey could establish the statutory mitigator of "no significant history of prior criminal activity" because of the 1988 change in the Florida law announced in *Scull v. State*, 533 So. 2d 1137, 1139 (Fla. 1988). Accordingly, the new balance would be one statutory aggravating factor against four statutory mitigating factors and many non-statutory mitigating factors.

IX. CONCLUSION

This Court should grant the petition for writ of certiorari.

Respectfully submitted,

DONALD B. VERRILLI, JR.
Jenner & Block LLP
601 13th Street, N.W.
Washington, D.C. 20005
(202) 639-6000

ROSS B. BRICKER*
JEFFREY A. KOPPY
THOMAS P. MONROE
LYDIA M. FLOYD
Jenner & Block LLP
330 North Wabash
Chicago, Illinois 60611
(312) 222-9350

*Counsel of Record

April 9, 2007

Appendix A

Supreme Court of Florida.
Harold Lee HARVEY, Appellant,
v.
STATE of Florida, Appellee.

No. SC95075.

June 15, 2006.
Rehearing Denied Jan. 8, 2007.

PER CURIAM.

Harold Lee Harvey, a prisoner under a sentence of death, appeals an order of the trial court denying his motion for postconviction relief under Florida Rule of Criminal Procedure 3.850. We have jurisdiction. *See* art. V, § 3(b)(1), Fla. Const. We previously issued an opinion in this case which only addressed the issue of whether counsel was ineffective for conceding Harvey's guilt of first-degree murder. We found counsel was ineffective and remanded the case for a new trial. While rehearing was pending, the United States Supreme Court granted certiorari review of this Court's opinion in *Nixon v. State*, 857 So.2d 172 (Fla.2003), which addressed the same issue. The court reversed our decision, *Florida v. Nixon*, 543 U.S. 175, 125 S.Ct. 551, 160 L.Ed.2d 565 (2004), and held that the proper standard to be applied in cases involving counsel's concession of guilt is the two-pronged test outlined in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Therefore, we issue this opinion on rehearing and address all of the issues raised in Harvey's motion for postconviction relief. The opinion issued on July 3, 2003, is withdrawn, and this opinion is substituted in its place. For the reasons set forth below, we affirm the trial court's denial of rule 3.850 relief.

FACTS AND PROCEDURAL HISTORY

Harvey was charged with two counts of first-degree murder in the killings of William and Ruby Boyd, which occurred during the course of a robbery at the Boyds' home. After obtaining money from the Boyds, Harvey and Scott Stiteler, the codefendant, discussed what they were going to do with the victims and decided they had to kill them. Harvey shot both victims. *Harvey v. State*, 529 So.2d 1083, 1084 (Fla.1988).

At trial, Harvey was convicted of both counts of first-degree murder. The jury recommended death by a vote of eleven to one on each conviction. The sentencing judge found four aggravating circumstances[1] and as mitigating circumstances found Harvey had a low IQ and poor educational and social skills. *Id.* at 1088 n. 5.

On appeal, we affirmed Harvey's convictions and sentences of death. *Id.* at 1088. After the governor signed a death warrant on March 29, 1990, Harvey filed a petition for writ of habeas corpus with this Court along with a request for stay of execution. We issued a stay so that Harvey could seek relief under rule 3.850. Thereafter, Harvey filed a motion for postconviction relief in the trial court. After an evidentiary hearing on one of the claims, the trial judge entered an order denying relief. Harvey appealed the denial of his postconviction motion, raising seventeen claims, and he also filed a supplemental habeas petition raising seven issues. We denied the petition for writ of habeas corpus, but reversed the

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[1] The murders were found to be (1) especially heinous, atrocious, or cruel; (2) committed for the purpose of avoiding lawful arrest; (3) committed in a cold, calculated, and premeditated manner; and (4) committed during the commission of or the attempt to commit robbery or burglary. *Id.* at 1087 n. 4, 104 S.Ct. 2052.

trial court's summary denial of the postconviction motion as to five issues and remanded to the trial court to determine if Harvey was denied effective assistance of counsel. *Harvey v. Dugger*, 656 So.2d 1253 (Fla.1995).[2] After an evidentiary hearing on these five issues, the trial court denied postconviction relief in an amended order.

Harvey now appeals the denial of postconviction relief, raising the following claims for review: (1) whether trial counsel was ineffective for failing to investigate and present evidence of mental mitigation; (2) whether trial counsel was ineffective for failing to adequately investigate and present mitigating evidence; (3) whether trial counsel was ineffective for admitting Harvey's guilt during opening statement; (4) whether trial counsel was ineffective for failing to make several arguments in support of his motion to suppress Harvey's confession;[3] and (5) whether the cumulative effect of trial counsel's other errors constituted ineffective assistance of counsel. For the reasons explained below, we affirm the trial court's denial of relief.

DISCUSSION

I. Ineffective Assistance of Counsel/Guilt Phase

A. Admission of Guilt

Harvey claims that trial counsel was ineffective for admitting guilt without his consent during the guilt phase opening

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[2] This Court affirmed the denial of Harvey's remaining rule 3.850 claims. *See Harvey v. Dugger*, 656 So.2d 1253 (Fla.1995).

[3] In *Harvey v. Dugger*, 656 So.2d at 1256, we found the remainder of this claim to be procedurally barred, with the exception of the portion of the claim relating to the booking sheet, because the issue of the suppression of Harvey's confession was raised on direct appeal and rejected by this Court.

statement. The trial court concluded that counsel's concession of guilt was not a concession of guilt to first-degree murder and thus was not improper. Harvey argues that trial counsel's statements to the jury were the functional equivalent of a guilty plea to both first-degree and second-degree murder, and that this concession of guilt, without Harvey's consent, constituted, per se, ineffective assistance of counsel.[4] The State argues that the trial court properly denied relief because trial counsel did not concede guilt to the crime charged.

Crucial to this issue's resolution is a determination of the appropriate standard of review. We initially reviewed this issue under our earlier decision in *Nixon v. Singletary*, 758 So.2d 618 (Fla.2000), which relied on the per se rule of ineffective assistance of counsel discussed in *United States v. Cronic*, 466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984). However, the United States Supreme Court held in *Florida v. Nixon*, 543 U.S. 175, 125 S.Ct. 551, 160 L.Ed.2d 565 (2004), that a defendant's claim of ineffective assistance of counsel based on counsel's concession of guilt to the crime charged, even without the defendant's consent, must be evaluated under the standard set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). That is, in order to establish a claim of ineffective assistance of counsel, the defendant must demonstrate that counsel's performance was deficient and that the defendant was prejudiced by the deficient performance. As to the first or performance prong of *Strickland*, the defendant must establish that "counsel made errors so serious that counsel

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[4] Florida Rule of Criminal Procedure 3.171(c)(1) provides: Defense counsel shall not conclude any plea agreement on behalf of a defendant-client without the client's full and complete consent thereto, being certain that any decision to plead guilty or nolo contendere is made by the defendant.

was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland* 466 U.S. at 687, 104 S.Ct. 2052. On the second or prejudice prong, the reviewing court must determine whether there is a reasonable probability that, but for the deficiency, the result of the proceeding would have been different. *See id.* at 694, 104 S.Ct. 2052. "Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable." *Id.* at 687, 104 S.Ct. 2052.

Trial counsel began his arguments to the jury by stating:

> Harold Lee Harvey is guilty of murder. If anything is established over the next week it will be that Harold Lee Harvey is guilty of murder. I have been doing defense work for some time. I've never said that in a court of law, that my client is guilty of murder. But he is. That doesn't by any means end your consideration of his case. The physical act that he committed was that he pulled the trigger on what was an automatic military weapon firing it into a room, discharging projectiles that hit human beings and killed them.
>
> Now, what events lead up to that? What events place this young man in that chair in this room before these 14 people to determine not whether or not he's a murderer but merely what type of murderer he is?

Based on these statements, the State argues that trial counsel's strategy was obvious: trial counsel was attempting, in the face of Harvey's confession, to argue that while Harvey did commit murder, it was second-degree murder because it was done without premeditation. However, the State's position is not supported by the record when viewed with trial counsel's entire opening statement. In describing the

events leading up to the murder, trial counsel stated the following:

> And then it happened just about the way that Mr. Morgan said it did. When they got there Mrs. Boyd surprised them. She was outside the house. She was on her way out to get the garbage, they didn't have time to put their masks on. Mrs. Boyd came up to them, it was, I believe, shortly before nightfall, and asked them at the front door, "What are you doing out here?" And Stiteler looked at Lee and Lee looked at Stiteler and they knew that things were starting to go wrong.
>
> And they had Mrs. Boyd walk back into the house and Mr. Boyd was in the house and they told them, "We want your money." And Stiteler ran around the house, all through the house looking for this cache of money, while Lee went into the bedroom with Mr. and Mrs. Boyd. Mr. and Mrs. Boyd then gave Lee what little bit they had, which was about $30 or $40 at the time. They didn't have any stash of money there. And Stiteler never did find the stash of money and they came down and completed the robbery. And little facts come out in cases that are always sometimes more indicative of what's really going on and is more indicative about the human beings involved than what the real plan was than other things. And the little fact in this case is Mr. Boyd asked for money for church, it was Saturday. And he said, "I have to go to church tomorrow, you're taking all my money." After all, he's thinking this is the neighbor kid. I know this kid, he lives over here. What's this crazy kid doing? And Lee gave him back money for church, because he didn't plan to kill him.
>
> But then they went outside. And at that time Stiteler had the imposing weapon and Lee had the handgun. And at that point they began this frenzied conversation. They

were just outside the home and the door was half open. They asked Mr. and Mrs. Boyd to sit down at a card table in the room, and you'll see pictures of the room.

And they had this conversation and without question what was discussed during this conversation was whether or not to kill these two people. This is a crazy conversation for these two young men to be having but that's what it had gotten to.

(Emphasis added.) The emphasized language clearly demonstrates that trial counsel admitted that Harvey deliberated his plan to kill the Boyds. By stating that Harvey and Stiteler had a conversation in which they discussed the plan to commit murder, trial counsel conceded that Harvey acted with premeditation and, therefore, conceded Harvey's guilt of first-degree murder.

However, because Harvey has failed to demonstrate prejudice based on counsel's concession of guilt, we need not address the deficiency prong of *Strickland*, and we deny 3.850 relief on this issue. *See* *Strickland v. Washington*, 466 U.S. at 697, 104 S.Ct. 2052 (holding there is no need for a court deciding an ineffective assistance of counsel claim to address both prongs of the inquiry if there as been an insufficient showing on one prong). In order to establish prejudice, a defendant must demonstrate that there is a reasonably probability that the result of the proceeding would have been different, but for counsel's unprofessional error. *See* *Valle v. State*, 778 So.2d 960, 965-66 (Fla.2001) (quoting *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), and *Williams v. Taylor*, 529 U.S. 362, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000)).

Trial counsel testified that he was trying to fashion a defense around Harvey's confession, which he knew the jury would

hear. Thus, counsel's strategy was to concede that Harvey committed second-degree murder and argue that he did not have the necessary intent for first-degree murder. The trial court's amended order on Harvey's motion for postconviction relief provides the following facts: Harvey was arrested on two counts of second-degree murder and one count of robbery. He was immediately interviewed. The interview lasted throughout the morning and into the afternoon. It was during this interview that Harvey made a confession. Harvey never requested a lawyer. After his first appearance, counsel was appointed and Harvey was indicted on two counts of first-degree murder. At trial, Harvey's full confession was admitted into evidence. In the confession, Harvey told police that he and the codefendant went to the victims' house to rob them. They cut the power lines from the telephone pole. They went to the victims' door and were surprised when Mrs. Boyd approached them from outside the house and asked them if she could help them. They were not wearing masks. At that point, Harvey brandished a gun and took Mrs. Boyd inside the house and told her he wanted her money. Harvey told police that after they took the victims' money, they stood there talking about what they were going to do. They decided to kill the Boyds. Harvey said, "Well, they know me. What are we gonna do?" The codefendant said he did not know, and said, "I guess we're gonna have to kill'em, shoot'em." Harvey indicated the victims heard the conversation. He said the victims started to run, so he shot them. He further said that he then ran out of the door, and the codefendant was waiting for him in Harvey's car. Harvey went back in the house for the shell casings, and because Mrs. Boyd was still moaning, he shot her again in the head. He left, got in the car, and as he and the codefendant drove down the street, he realized that he had left the victims' wallets in the house and that he had touched them. They turned around and went back. Harvey went into the house and retrieved the wallets.

Trial counsel said nothing more to the jury than what Harvey said during his confession to police. The evidence against Harvey was overwhelming even without counsel's admission that Harvey committed first-degree murder. *See, e.g.*, *Patton v. State*, 784 So.2d 380 (Fla.2000) (finding the facts counsel conceded were supported by overwhelming evidence and even if counsel had denied these facts, there was no reasonable possibility the jury would have rendered a different verdict). We cannot say, given all of the evidence introduced at trial, there is a reasonable probability that, but for any errors by counsel, the result of the proceeding would have been different, i.e., that our confidence in the outcome has been undermined.

Therefore, we affirm the trial court's denial of relief on this issue.

B. Motion to Suppress

Harvey next alleges that trial counsel was deficient in arguing the motion to suppress his confession made to police because counsel failed to introduce the police booking sheet pertaining to his arrest. Initially, the trial court summarily denied this claim. This Court reviewed the summary denial and remanded the issue for a hearing, stating that if the booking sheet was authentic, and if it was signed at 6:35 a.m., it "might bear on Harvey's claim of ineffective assistance of counsel in relation to the motion to suppress." *Harvey v. Dugger*, 656 So.2d at 1257.

On remand, the trial court conducted an evidentiary hearing and found that Harvey was arrested at 6:20 a.m. He arrived at the Okeechobee County jail at approximately 6:30 a.m. The booking officer only asked Harvey his name and noted a $3 million bond. Harvey was then immediately taken to an

office and interviewed by Florida Department of Law Enforcement Officer Pete Lanier, Okeechobee County Chief Deputy O.L. Raulerson, and Deputy Sheriff Gary Hargraves. At no time during the interview, which lasted through the afternoon, did Harvey ask for a lawyer. Prior to making his statements, Harvey signed five forms waiving his *Miranda*[5] rights, including the right to counsel.

Harvey made two incriminating statements during the course of the interview. The booking sheet was completed at approximately 5:50 p.m. Rose Bennett, a corrections officer, testified at the evidentiary hearing that she completed the booking sheet, including the portion of the booking sheet regarding Harvey's invocation of his right to counsel, prior to the first appearance hearing. She stated that she must have checked the box concerning a request for an attorney just before the hearing because the public defender was present then and had seen Harvey, and she included his name on the sheet. The first appearance hearing was held at 6:10 p.m. before County Judge Burton Connor. Harvey was then photographed and fingerprinted at approximately 7:15 p.m. Based upon these factual findings, the trial court concluded that the introduction of the booking sheet would not have been helpful because the booking sheet indicates that Harvey requested a lawyer after he made the incriminating statements.

Because the booking sheet was completed and the request for counsel was made after Harvey's confession, trial counsel was not deficient for failing to submit the booking sheet in support of the motion to suppress. This Court remanded this matter for an evidentiary hearing to determine if the booking

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[5] *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

sheet was signed at 6:35 a.m. It has been determined that the booking sheet was not signed at 6:35 a.m.; therefore, Harvey's claim that counsel was deficient has not been demonstrated.

II. Ineffective Assistance of Counsel/Penalty Phase
A. Failure to Investigate and Present Evidence of Mental Mitigation

Harvey claims his trial counsel was ineffective for failing to ensure that he received a competent mental health examination. Ineffective assistance of counsel claims are mixed questions of law and fact. This Court therefore conducts "an independent review of the trial court's legal conclusions, while giving deference to the trial court's factual findings." *State. v. Riechmann*, 777 So.2d 342, 350 (Fla.2000); *see also Cherry v. State*, 781 So.2d 1040 (Fla.2000). The trial court's factual findings will be upheld when they are supported by competent, substantial evidence in the record. *See Stephens v. State*, 748 So.2d 1028, 1035 (Fla.1999).

Harvey alleges that trial counsel failed to fully investigate his background for mental health mitigation. The trial court found, however, that trial counsel retained psychologist Dr. Fred Petrilla, met and ate dinner with Harvey's parents and siblings on two occasions, and obtained Harvey's school records. The trial court also found that Dr. Petrilla interviewed Harvey's family and coworkers and that Dr. Petrilla was given background material concerning Harvey. These findings are supported by the record.

At the evidentiary hearing, trial counsel testified that he was concerned with Harvey's mental health and hired Dr. Petrilla for the purpose of conducting a mental health evaluation. Counsel indicated that he provided Dr. Petrilla with case materials and medical records. Counsel testified that neither

Harvey nor Harvey's family gave him any indication of possible mental health mitigators, although they did inform counsel that Harvey had been in a serious car accident when he was sixteen years old. Trial counsel said it was determined that Harvey had never been institutionalized. Dr. Petrilla testified at the evidentiary hearing that he performed a personality assessment and several other tests on Harvey. He also said he tested Harvey to determine his IQ. Dr. Petrilla further testified that he and trial counsel discussed the results of these tests. As a result of this testing, Dr. Petrilla recommended that Harvey be given antidepressant medications and receive psychotherapy with assertiveness training. He tested Harvey for organic brain damage, but he did not diagnose Harvey as having brain damage. Dr. Petrilla's testimony at the penalty phase of the trial was consistent with his investigation. He testified that Harvey was depressed, had low-self esteem, had a mental age of eighteen years and a physical age of twenty-three, did not have brain damage, and was impulsive.

Harvey argues that trial counsel was deficient because he did not retain a psychiatrist as Dr. Petrilla had recommended. As the trial court found, trial counsel and Dr. Petrilla conferred, and Dr. Petrilla recommended Dr. Carmen Ebalo as an examining psychiatrist for Harvey. Harvey argues that because his own psychologist recommended that he be evaluated by a psychiatrist, trial counsel was deficient in failing to retain one.

Although Dr. Petrilla suggested it, trial counsel testified at the evidentiary hearing that he did not employ a psychiatrist because he felt the jury might see calling more than one mental health expert as trying too hard to make an excuse for bad behavior, especially given the fact that Harvey had never been treated for mental illness. Based on the evidence available to trial counsel, including his interviews with

Harvey's parents, trial counsel's decision was consistent with his sound trial strategy to present Harvey as a good person with a positive family upbringing. The evidence presented at the postconviction hearing painted Harvey in a different light and would have been inconsistent with the trial strategy that was employed.

While in hindsight counsel could have pursued a different penalty phase strategy, the strategy counsel employed was not unreasonable and did not fall outside the broad range of competent performance "under prevailing professional norms." *Strickland*, 466 U.S. at 688, 104 S.Ct. 2052. In considering a claim of ineffective assistance of counsel, we must fairly assess trial counsel's performance at the time of trial based on the information he had. "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Id.* at 689.

In order to obtain a reversal of his death sentence on the ground of ineffective assistance of counsel, Harvey must show (1) that the identified acts or omissions of counsel were deficient or outside the wide range of professionally competent assistance, and (2) that the deficient performance prejudiced the defense such that, without the errors, there is a reasonable probability that the balance of aggravating and mitigating circumstances would have been different. *See Banks v. State*, 842 So.2d 788, 790 (Fla.2003); *Rose v. State*, 675 So.2d 567, 571 (Fla.1996).

Harvey has not demonstrated that trial counsel was deficient in his investigation of possible mental health mitigation. This Court has found counsel's performance to be deficient where counsel "never attempted to meaningfully investigate

mitigation" although substantial mitigation could have been presented. *Rose*, 675 So.2d at 572; *see also Hildwin v. Dugger*, 654 So.2d 107, 109 (Fla.1995) (finding that a woefully inadequate investigation failed to reveal a large amount of mitigating evidence such as prior psychiatric hospitalizations and statutory mental health mitigators); *State v. Lara*, 581 So.2d 1288, 1289 (Fla.1991) (finding counsel virtually ignored preparation for penalty phase). This is not the case here. Consistent with the trial court's factual findings, trial counsel conducted a reasonable investigation into Harvey's mental health background and incorporated his findings into a penalty phase strategy.

Trial counsel explained his strategy at the evidentiary hearing. He chose to present Harvey as a "good person." Trial counsel wanted the jury to see that these murders were inconsistent with Harvey's character and were committed without premeditation in the midst of a robbery gone wrong. Trial counsel testified that he thought about this strategy and decided to implement it after the motion to suppress Harvey's statement was denied. Trial counsel testified that he thought it was important to carry a consistent theme throughout both phases of the trial and believed this was Harvey's best chance for a life sentence. In cases where counsel did conduct a reasonable investigation of mental health mitigation and then made a strategic decision not to present this information, this Court has affirmed the trial court's finding that counsel's performance was not deficient. *See Asay v. State*, 769 So.2d 974, 985 (Fla.2000). We agree with the trial court and find that trial counsel's strategy was not unreasonable under the circumstances and did not fall outside the range of professional competent assistance.

B. Failure to Investigate and Present Other Mitigating Evidence

Harvey next argues that trial counsel was ineffective in failing to investigate and present the mitigating evidence of his personal background. We disagree because the record supports the trial court's findings and conclusion that counsel conducted a reasonable investigation and presented this evidence at the penalty phase proceeding. At the conclusion of the postconviction evidentiary hearing, the trial judge made the following findings in his order denying relief:

> Mr. Watson met with Mr. Harvey's mother and father and siblings and ate dinner in their home on two occasions. He felt they were good, decent people. He also obtained Mr. Harvey's school records. He did not uncover any evidence that Harvey used or abused cocaine or marijuana or Quaaludes, that he drove an automobile drunk, or that his parents abused him. He determined that Harvey was involved in a very serious automobile accident at age 16 where he lost consciousness and a female companion was killed. He determined that Harvey had never been institutionalized.
>
> During the penalty phase the defendant presented 16 witnesses including Dr. Petrilla who testified that he had been a state's witness in earlier cases and that this was the first time he had testified in a death penalty case for a defendant.
>
> The evidence including Dr. Petrilla's testimony showed that Harvey was depressed, had low self-esteem and a mental age of 18 and physical age of 23, did not have brain damage, and was impulsive. Evidence was also presented that he was hard-working, from a good, decent family who would be negatively effected [sic] if he would be executed,

that he had been a loving brother to his disabled sister, that the crime was out of character, and that he was pressured by his wife to provide things he could not financially do. Evidence showed that he was involved in the fatal accident at age 16 and would be able to adapt to a life sentence in prison.

Thus, it is evident that trial counsel presented much of the evidence that postconviction counsel has presented and that trial counsel presented the evidence that was uncovered during his investigation of this case.

As the trial judge found, sixteen witnesses testified on Harvey's behalf at the penalty phase proceeding concerning his background and history. These witnesses included Harvey's parents and siblings, who testified concerning Harvey's history and background. Other witnesses who testified included family friends, family members, an employer, a coworker, and several teachers. In sum, the witnesses stated that Harvey had a normal childhood, was a loving son, brother, and friend, was generally a good person, and came from a loving and hard-working family. The jury viewed several childhood photographs of Harvey with his siblings, as well as home movies of various family outings. This evidence is consistent with the general theme that the murders were out of character for Harvey.

At the evidentiary hearing, Harvey presented witnesses who painted a new and different picture of his background, including extreme poverty, physical abuse, substance abuse, and mental problems. The evidence Harvey now presents supports an entirely different theory for the penalty phase. However, speculation that another theory of defense would have been more successful is not sufficient to establish the deficiency prong of *Strickland.* In *Strickland,* the Supreme Court stated that "strategic choices

made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable." 466 U.S. at 690, 104 S.Ct. 2052. *See also* *Wiggins v. Smith*, 539 U.S. 510, 521, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003) (stating that "the deference owed such strategic judgments" under *Strickland* is defined "in terms of the adequacy of the investigations supporting those judgments"). The record clearly demonstrates that counsel conducted an adequate investigation into Harvey's background, and that counsel presented the evidence that was discovered during his investigation to argue for a sentence less than death.

We therefore find that counsel's performance was not deficient.

C. Other Alleged Penalty Phase Errors

Harvey next argues that trial counsel committed other penalty phase errors and that the cumulative effect of these errors warrants reversal. He claims that counsel failed to know the law relating to the mitigating factor of "no significant history of prior criminal activity," that counsel conceded several aggravating factors, that counsel failed to investigate potential aggravating and mitigating factors, that counsel encouraged the introduction of irrelevant and highly prejudicial testimony, that counsel permitted nonstatutory aggravating evidence of lack of remorse, and that counsel failed to present evidence on Harvey's behalf prior to sentencing.

Harvey claims that counsel should have waived the mitigating factor of lack of significant history of prior criminal activity because otherwise the State was allowed to present evidence of his escape from jail after his arrest on these charges. At the time of this trial, acts committed prior to sentencing and after the murder could be considered for

purposes of sentencing. *See* Ruffin v. State, 397 So.2d 277, 283 (Fla.1981). In this case, the State was permitted to introduce evidence of Harvey's escape. In fact, during the guilt phase of the trial, the State introduced evidence of the escape and the theft of a motor vehicle. Because this evidence had already been presented to the jury during the guilt phase, we agree with the trial court that counsel was not ineffective for failing to waive the mitigating factor of lack of significant criminal history.

Next, Harvey argues that trial counsel improperly attempted to distance himself from Harvey in arguments to the jury by expressing revulsion at what Harvey had done. The trial court reviewed the statements, and found that counsel's final argument was a "well-organized plea for mercy." This finding is supported by the record. Trial counsel argued that the killings were out of character for Harvey and emphasized that the killings occurred while Harvey was in a state of panic after the robberies were completed. Trial counsel also emphasized that there was no intent to kill at the time Harvey went to the Boyds' home. At the evidentiary hearing, trial counsel explained that his strategy for the closing penalty phase argument was to use the guilt phase to set the tone for the penalty phase and to maintain consistency between both phases. The comments upon which Harvey relies were clearly part of counsel's overall strategy to portray Harvey as a panicked young man who did not intend to commit murder. Trial counsel explained that given the jury's decision to convict, he could not tell them that the decision was unreasonable. Rather, counsel acknowledged the verdict and then made a plea that Harvey was deserving of mercy.
Harvey relies heavily on *Clark v. State*, 690 So.2d 1280 (Fla.1997), in support of this claim. In *Clark*, this Court held that trial counsel failed to function reasonably as an effective counsel when he indicated his own doubts or distaste for the case and when he attacked the defendant's character and

emphasized the seriousness of the crime. *Id.* at 1283. Furthermore, in *Clark*, trial counsel "virtually encouraged the jury to impose the death penalty, [and] he assisted the prosecution in making its case." *Id.* In the case now before us, trial counsel did not encourage the jury to impose the death penalty, but instead maintained a consistent theme, pleading for mercy and a life sentence. Trial counsel's performance was not deficient.

Harvey also argues that trial counsel's failure to investigate potential aggravating and mitigating factors constituted ineffective assistance of counsel. He argues that counsel failed to investigate evidence concerning the heinous, atrocious, or cruel aggravating factor. Harvey bases this claim on the sentencing court's finding that that the victims had, in fact, heard conversations between Harvey and his codefendant about disposing of the witnesses. Harvey argues that trial counsel should have challenged this evidence because the television was loud and one of the victims was hard of hearing. However, as the trial court found, the evidence that the victims began to run and the defendant's own statement support the conclusion that the victims heard the conversation that took place between Harvey and the codefendant wherein they discussed killing the victims. Ineffective assistance of counsel has not been demonstrated.

Harvey also asserts that trial counsel should have pursued the theory that he was substantially dominated by the codefendant. The trial court found that counsel had requested a jury instruction on substantial domination and the request was denied. Counsel then decided not to argue that Harvey was under substantial domination by another because the evidence did not support this theory. Harvey was older than his codefendant, they went to the crime scene in Harvey's car, Harvey was married with marital pressures, and Harvey was the shooter and took the automatic weapon from

his codefendant's hands immediately before shooting the victims. These findings are supported by the record. Trial counsel was not deficient for failing to argue the mitigating factor of substantial domination.

Harvey next claims trial counsel encouraged the introduction of irrelevant and highly prejudicial testimony. A guard at the Okeechobee County jail was allowed to testify concerning a statement made by Harvey to another inmate to the effect that he had killed twice, had nothing to lose, and would kill again. The trial judge ruled that only the first part of the statement was admissible. However, defense counsel asked the trial judge to admit the entire statement. Defense counsel wanted to put the entire statement into context by explaining the circumstances under which it was made. Counsel questioned the officer about the statement and demonstrated that the other inmate initiated an altercation with Harvey. Counsel's examination showed that Harvey had ignored the other inmate for one-half hour before the statement was made. Under these circumstances, we cannot say that counsel's strategy in handling this matter amounted to ineffective assistance of counsel.

Next, Harvey asserts that trial counsel permitted the admission of nonstatutory aggravating evidence of lack of remorse in violation of *Randolph v. State*, 562 So.2d 331 (Fla.1990). The record reflects that the defense relied on remorse as a mitigating factor during the penalty phase and the State attempted to rebut this factor. Even though the defense argued remorse as a mitigating factor, defense counsel nonetheless objected to the State presenting any evidence on lack of remorse. Counsel's objection to the State's evidence on lack of remorse was overruled. Thus, Harvey has failed to demonstrate ineffective assistance of counsel.

Finally, Harvey argues that trial counsel was ineffective because the sentencing occurred two hours after the jury returned its advisory verdict, and trial counsel only said, "We know of no legal cause of non-sentencing." Harvey argues that counsel was ineffective because he called no witnesses and made no argument for a life sentence. However, Harvey does not allege any new information that counsel could have presented at this stage. Thus, this claim is insufficiently pled, and Harvey has failed to demonstrate that trial counsel's performance was deficient.

Because Harvey has failed to show that any of the alleged errors demonstrate both the deficiency and prejudice prongs of the test set forth in *Strickland*, there are no errors to consider cumulatively. As the trial court found, "[T]he overall and specific effects of Mr. Watson's efforts were effective assistance of counsel." We affirm the trial court's order. *See Downs v. State*, 740 So.2d 506, 509 (Fla.1999) (holding that where allegations of individual error are without merit, a cumulative error argument based thereupon must also fail).

CONCLUSION

For the reasons set forth above, we affirm the trial court's denial of postconviction relief.

It is so ordered.

WELLS, LEWIS, QUINCE, CANTERO, and BELL, JJ., concur.

ANSTEAD, J., concurs in part and dissents in part with an opinion, in which PARIENTE, C.J., concurs.

ANSTEAD, J., concurring in part and dissenting in part.

While I concur in the majority opinion in many respects, including its decision to grant rehearing on the *Nixon* issue, I cannot concur in the majority's ultimate conclusion that the defendant is not entitled to a new penalty phase proceeding. It is apparent that trial counsel's conduct was deficient in numerous respects and that there was no genuine adversarial testing of the appropriate penalty to be imposed in this case.

First, as to the *Nixon* issue, it is apparent from the postconviction proceedings that counsel's conduct was deficient. In fact, counsel gave detailed testimony that his strategy was to demonstrate that the defendant was guilty at most of second-degree murder, a crime to which the death penalty does not apply. He testified that he probably told the defendant of this second-degree murder strategy and that it was this theory that he outlined in his opening statement. However, as detailed in the majority opinion, defense counsel did *not* outline a second-degree murder case in his opening statement. Rather, as the majority explains, defense counsel conceded the defendant's guilt to premeditated murder, i.e., first-degree capital murder. Unfortunately, this strategy of conceding guilt to two senseless killings permeated counsel's performance. Counsel's summations to the jury in the guilt and penalty phases simply demonstrated his inability to do much more than show his frustration at having to defend the case.

Second, counsel's frustration may have been understandable if he had done a thorough job of investigating the defendant's life for evidence of mitigation. However, he was content with a superficial investigation. For example, while counsel did consult with a psychologist, someone without a medical degree or license to practice medicine, he then proceeded to ignore the psychologist's pointed and repeated advice that a medically trained and licensed psychiatrist be consulted. Of

course, we now know because of the unrebutted evidence presented at the postconviction evidentiary hearing that had the psychiatrist been consulted, numerous and serious mental problems, including organic brain damage, would have been detected. In addition, the causes for these serious mental problems growing out of the defendant's deprived and abusive childhood, and at least two major traumatic events, could have been properly developed and presented to the judge and jury, including evidence of several important statutory mitigators and extensive nonstatutory mitigation. But, due to counsel's blatant neglect in heeding the psychologist's advice, none of this powerful mitigating evidence was ever investigated, developed, or presented. As our death penalty jurisprudence makes clear, counsel's duty is to thoroughly investigate first, and then evaluate in order to develop a sound defense strategy. We have a clear breach of counsel's duty here and substantial prejudice as a result. In the face of an almost apologetic case for mitigation, the jury's recommendation for death was virtually a certainty.

Finally, after the jury returned its recommendation of death, counsel essentially abandoned his client. Defense counsel presented absolutely no case for life to the true sentencer, the trial judge, and of course, the trial judge simply followed the jury's recommendation. Because it is the trial court that does the actual sentencing, it is essential that counsel not abandon his client and that counsel be prepared to make a case for life to the trial court. That did not happen here.

I would hold that we cannot have confidence in the outcome of proceedings so infected by trial counsel's neglect and ineffectiveness. While counsel's neglect may ultimately have made no difference in the establishment of his guilt, the record in this case clearly establishes that the adversarial testing mandated by *Strickland* did not take place in the penalty phase proceedings of this case. We should remand

for a new penalty phase, so that this essential adversarial testing can take place before a reasoned and informed judgment is rendered on life or death.

PARIENTE, C.J., concurs.

Appendix B

SUPREME COURT OF FLORIDA

No. SC95075

HAROLD LEE HARVEY,
Appellant,

vs.

STATE OF FLORIDA,
Appellee.

[July 3, 2003]

PER CURIAM.

Harold Lee Harvey, a prisoner under a sentence of death, appeals an order of the trial court denying his motion for postconviction relief under Florida Rule of Criminal Procedure 3.850. We have jurisdiction. See art. V, § 3(b)(1), Fla. Const. For the reasons set forth below, we reverse the trial court's denial of rule 3.850 relief and remand to the trial court for a new trial.

FACTS AND PROCEDURAL HISTORY

Harvey was charged with two counts of first-degree murder in the killings of William and Ruby Boyd during the course of a robbery at the Boyds' home. After obtaining money from the victims, Harvey and his codefendant discussed what they were going to do with the Boyds and decided they would have to kill them. Harvey shot both victims. Harvey v. State, 529 So. 2d 1083, 1084 (Fla. 1988).

At trial, Harvey was convicted of the first-degree murders of the Boyds. The jury recommended death by a vote of eleven to one. The sentencing judge found four aggravating factors[1] and as a mitigating circumstance found that Harvey had a low I.Q. and poor educational and social skills Id. at 1088 n.5.

On appeal, we affirmed Harvey's convictions and sentences of death. Id. at 1088. After the governor signed a death warrant on March 29, 1990, Harvey filed a petition for writ of habeas corpus with this Court along with a request for stay of execution. We issued a stay so that Harvey could seek relief under rule 3.850. Thereafter, Harvey filed a motion for postconviction relief in the trial court. After an evidentiary hearing on one of the claims, the trial judge entered an order denying relief. Harvey appealed the denial of his postconviction motion, raising seventeen claims, and

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[1] The murders were found to be: (1) especially heinous, atrocious, or cruel; (2) committed for the purpose of avoiding lawful arrest; (3) committed in a cold, calculated, and premeditated manner; and (4) committed during the commission of or the attempt to commit robbery or burglary. Id. at 1087 n.4.

also filed a supplemental habeas petition raising seven issues. We denied the petition for writ of habeas corpus, but reversed the trial court's summary denial of the postconviction motion as to five issues to determine if Harvey was denied effective assistance of counsel. Harvey v. Dugger, 656 So. 2d 1253 (Fla. 1995).[2] After an evidentiary hearing on these five issues, the trial court denied postconviction relief in an amended order.

Harvey now appeals the denial of postconviction relief, raising the following claims for review: (1) whether trial counsel was ineffective for failing to investigate and present evidence of mental mitigation; (2) whether trial counsel was ineffective for failing to adequately investigate and present mitigating evidence; (3) whether trial counsel was ineffective for admitting Harvey's guilt during opening statement; (4) whether trial counsel was ineffective for failing to make several arguments in support of his motion to suppress Harvey's confession;[3] and (5) whether the cumulative effect of trial counsel's other errors constituted ineffective assistance of counsel. However, because we find the resolution of claim (3) to be dispositive, claims (1), (2), (4), and (5) are rendered moot in light of this opinion. See Clark v. State, 690 So. 2d 1280, 1282 n. 4 (Fla. 1997).

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[2] This Court denied Harvey's remaining rule 3.850 claims. See Harvey v. Dugger, 656 So. 2d 1253 (Fla. 1995).

[3] In Harvey v. Dugger, 656 So. 2d at 1256, we found the remainder of this claim to be procedurally barred with the exception of the portion of the claim relating to the booking sheet because the issue of the suppression of Harvey's confession was raised on direct appeal and rejected by this Court.

DISCUSSION

Harvey claims trial counsel was ineffective for admitting guilt without Harvey's consent during the guilt phase opening statement. Specifically, Harvey argues that trial counsel's statements to the jury were the functional equivalent of a guilty plea to both first-degree and second-degree murder, and that this concession of guilt, without Harvey's consent, constituted per se ineffective assistance of counsel.[4] The State, on the other hand, argues that the trial court properly denied relief because trial counsel did not concede guilt to the crime charged.

Crucial to this issue's resolution is a determination of the appropriate standard of review. As we have discussed numerous times, the Strickland v. Washington, 466 U.S. 668 (1984), standard normally applies to ineffective assistance of counsel claims. Under Strickland, in order to establish an ineffective assistance of counsel claim, a defendant must demonstrate (1) deficient performance by counsel and (2) prejudice to the defense. Id. at 687. However, there are instances where the rule announced in United States v. Cronic, 466 U.S. 648 (1984), applies to decisions of trial counsel. In Cronic, "the Supreme Court created an exception to the Strickland standard for ineffective assistance of counsel and acknowledged that certain circumstances are so egregiously prejudicial that ineffective assistance of counsel

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[4] Florida Rule of Criminal Procedure 3.17 1 (c)(l) provides:

> Defense counsel shall not conclude any plea agreement on behalf of a defendant-client without the client's full and complete consent thereto, being certain that any decision to plead guilty or nolo contendere is made by the defendant.

will be presumed." Stano v. Dugger, 921 F.2d 1125, 1152 (11th Cir. 1991) (en banc). The Supreme Court stated:

> Moreover, because we presume that the lawyer is competent to provide the guiding hand that the defendant needs, see Michel v. Louisiana, 350 U.S. 91, 100-101 (1959), the burden rests on the accused to demonstrate a constitutional violation. There are, however, circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified.
>
> Most obvious, of course, is the complete denial of counsel. The presumption that counsel's assistance is essential requires us to conclude that a trial is unfair if the accused is denied counsel at a critical stage of his trial. Similarly, if counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable. No specific showing of prejudice was required in Davis v. Alaska, 415 U.S. 308 (1974), because the petitioner had been "denied the right of effective cross-examination" which "'would be constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it.'" Id., at 318 (citing Smith v. Illinois, 390 U.S. 129, 131 (1968), and Brookhart v. Janis, 384 U.S. 1, 3 (1966)).

Cronic, 466 U.S. at 658-59 (emphasis added) (footnotes omitted). Thus, "Cronic only applies to the narrow spectrum of cases where the defendant was completely denied effective assistance of counsel." Nixon v. Singletary, 758 So. 2d 618, 622 (Fla. 2000).

To determine which test applies, we must first decide whether Harvey's trial counsel "entirely fail[ed] to subject the prosecution's case to meaningful adversarial testing." Cronic, 466 U.S. at 659. Trial counsel began his arguments to the jury by stating:

> Harold Lee Harvey is guilty of murder. If anything is established over the next week it will be that Harold Lee Harvey is guilty of murder. I have been doing defense work for some time. I've never said that in a court of law, that my client is guilty of murder. But he is. That doesn't by any means end your consideration of his case. The physical act that he committed was that he pulled the trigger on what was an automatic military weapon firing it into a room, discharging projectiles that hit human beings and killed them.
>
> Now, what events lead up to that? What events place this young man in that chair in this room before these 14 people to determine not whether or not he's a murderer but merely what type of murderer he is?

At this point, the State argues that trial counsel's strategy was obvious: trial counsel was attempting, in the face of Harvey's confession, to argue that while Harvey did commit murder, it was second-degree murder because it was done without premeditation. However, a review of trial counsel's entire opening statement tells a different story. In describing the events leading up to the murder, trial counsel stated the following:

> And then it happened just about the way that Mr. Morgan said it did. When they got there Mrs. Boyd surprised them. She was outside the house. She was on her way out to get the garbage, they

didn't have time to put their masks on. Mrs. Boyd came up to them, it was, I believe, shortly before nightfall, and asked them at the front door, "What are you doing out here?" And Stiteler looked at Lee and Lee looked at Stiteler and they knew that things were starting to go wrong. And they had Mrs. Boyd walk back into the house and Mr. Boyd was in the house and they told them, "We want your money." And Stiteler ran around the house, all through the house looking for this cache of money, while Lee went into the bedroom with Mr. and Mrs. Boyd. Mr. and Mrs. Boyd then gave Lee what little bit they had, which was about $30 or $40 at the time. They didn't have any stash of money there. And Stiteler never did find the stash of money and they came down and completed the robbery. And little facts come out in cases that are always sometimes more indicative of what's really going on and is more indicative about the human beings involved than what the real plan was than other things. And the little fact in this case is Mr. Boyd asked for money for church, it was Saturday. And he said, "I have to go to church tomorrow, you're taking all my money." After all, he's thinking this is the neighbor kid. I know this kid, he lives over here. What's this crazy kid doing? And Lee gave him back money for church, because he didn't plan to kill him.

But then they went outside. And at that time Stiteler had the imposing weapon and Lee had the handgun. And at that point they began this frenzied conversation. They were just outside the home and the door was half open. They asked Mr. and Mrs. Boyd to sit down at a card

> table in the room, and you'll see pictures of the room.
>
> And they had this conversation and without question what was discussed during this conversation was whether or not to kill these two people. This is a crazy conversation for these two young men to be having but that's what it had gotten to.

(Emphasis added.) The emphasized language above clearly demonstrates that trial counsel admitted that Harvey deliberated his plan to kill the Boyds. By stating that Harvey and Stiteler had a conversation in which they discussed the plan to commit murder, trial counsel conceded that Harvey acted with premeditation and, therefore, conceded Harvey's guilt to first-degree murder. Trial counsel's comments were the functional equivalent of a guilty plea, and for this reason, we find that trial counsel's performance failed to subject the prosecution's case to meaningful adversarial testing under Cronic and therefore must be presumed ineffective. See Atwater v. State, 788 So. 2d 223, 231 (Fla. 2001) (explaining when the Cronic presumption is applicable).

We faced a similar situation in Nixon. In that case, the defendant argued that trial counsel was ineffective because his opening and closing arguments contained statements that were the functional equivalent of a guilty plea. 758 So. 2d at 620. We agreed, and "conclude[d] that Nixon's claim must prevail at the evidentiary hearing below if the testimony establishes that there was not an affirmative, explicit acceptance by Nixon of counsel's strategy." Id. at 624 (emphasis added). In this case, the trial court has already conducted an evidentiary hearing on this issue, and made the following findings of facts and conclusion of law:

> Because [trial counsel] felt the confession "was the case," he had discussed with Mr. Harvey

during case preparation what his defense could be and that they probably would admit some degree of murder if the confession was not suppressed. They specifically discussed on more than one occasion that if the confession was ruled admissible, [trial counsel] would make an opening statement that Harvey was guilty of murder, but that it was second degree murder and not either premeditated or felony murder. Mr. Harvey said he understood this defense tactic.

[Trial counsel] stated to the jury during his opening statement that the evidence would show a murder was caused by a frightened and confused young Mr. Harvey after he and his friend had robbed the victims. He stated that Harvey did not intend to kill.

Defendant's trial counsel was not ineffective because of his opening statement to the jury. Key to whether the opening statement was ineffective is whether the strategy of conceding guilt of murder and arguing for a conviction of murder in the second degree had been discussed with Mr. Harvey. The argument for a second degree conviction is not per se ineffective and is a valid trial strategy, for which there was an evidentiary basis. The facts show a sufficient discussion of this strategy between counsel and defendant before the statement was made to the jury. The facts also show that the concession of guilt of murder was not of guilt of first degree murder and thus not an improper admission of guilty plea.

However, the trial court's factual findings are not supported by the record.

As outlined above, trial counsel's opening statement actually conceded first-degree murder because trial counsel stated that "without question" Harvey discussed whether to kill the Boyds before the murder. Trial counsel also indicated that Harvey and his codefendant were in the process of robbing the victims when the murders were committed, thereby conceding Harvey's guilt to felony murder. Testimony from the evidentiary hearing demonstrates that, at best, trial counsel informed Harvey of his strategy to concede guilt to second-degree murder. Trial counsel testified that in light of Harvey's confession, "I was offering [the jury] the opportunity of convicting him of murder while saving his life and pointing out that second degree murder is murder . . . . They could convict him of murder and feel as though they had done their civic duty while still saving his life." Harvey, however, testified that he did not consent to trial counsel's statements to the jury conceding any degree of murder, and even so, "[s]ilent acquiescence is not enough." Nixon, 758 So. 2d at 624. While we would be inclined to agree with the trial court's conclusion had trial counsel conceded only second-degree murder, we cannot agree in light of trial counsel's opening remarks to the jury.

We are aware that Nixon did not involve a confession. However, even in cases involving a confession, the jury is free to give as much or as little weight to the confession as it wishes. As we explained in Nixon: "In every criminal case, a defense attorney can, at the very least, hold the State to its burden of proof by clearly articulating to the jury or fact-finder that the State must establish each element of the crime charged and that a conviction can only be based upon proof beyond a reasonable doubt." 758 So. 2d at 625. In other words, trial counsel cannot be excused for conceding guilt and, under the facts of this case, failing to subject the prosecution's case to a meaningful adversarial testing just

because Harvey confessed to the crime charged. We made it very clear in Nixon that a defendant must give an "affirmative, explicit acceptance" of counsel's strategy to concede guilt because conceding guilt is the functional equivalent of a guilty plea. Id. at 624; see also Atwater, 788 So. 2d at 231 ("Thus, in Nixon we held that unless the defendant expressly consented to this strategy, or in effect knowingly and voluntarily consented to decline meaningful adversarial testing of the prosecution's case, then prejudice to the defendant is presumed and counsel is thus per se ineffective."). Here, Harvey pled not guilty to the charges against him, including first-degree murder. Trial counsel's concessions, however, rendered that not guilty plea a nullity.

CONCLUSION

In sum, we find that trial counsel conceded Harvey's guilt to first-degree murder by stating, in his guilt phase opening statement, that Harvey acted with premeditation and that the murder was committed during the course of a robbery. Trial counsel testified at the evidentiary hearing that he conceded guilt in response to the denial of the motion to suppress Harvey's confession; however, trial counsel also repeatedly testified that his strategy was to concede guilt only to second-degree murder by arguing Harvey did not intend to kill the Boyds. A close reading of trial counsel's opening statement shows that he did otherwise. Thus, we conclude that under Nixon and Cronic, trial counsel's performance in this case constituted per se ineffective assistance of counsel. For this reason we reverse the denial of Harvey's motion for postconviction relief and remand with directions that his convictions be vacated.

It is so ordered.

ANSTEAD, C.J., PARIENTE and QUINCE, JJ., and SHAW, Senior Justice, concur.

WELLS, J., dissents with an opinion.

LEWIS, J., dissents.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION, AND IF FILED, DETERMINED.

WELLS, J., dissenting.

For many of the same reasons that I dissented in Nixon v. Singletary, 758 So. 2d 618 (Fla. 2000), I dissent here. In addition, I find this decision, in its application of United States v. Cronic, 466 U.S. 648 (1984), to be in conflict with this Court's decision in Atwater v. State, 788 So. 2d 223 (Fla. 2001), and the Eleventh Circuit's decision in McNeal v. Wainwright, 722 F.2d 674 (11th Cir. 1984).

However, it is also my view that here the present majority does not follow what this Court did in remanding this case for an evidentiary hearing on this issue in 1995 in Harvey v. Dugger, 656 So. 2d 1253, 1256 (Fla. 1995):

> In claim 1(f), Harvey argues that he was denied effective assistance of counsel in the guilt phase of the trial when without his consent, defense counsel conceded Harvey's guilt in the opening argument. Harvey maintains that this concession nullified his fundamental right to have the issue of guilt or innocence presented to the jury as an adversarial issue. Because the record before us is unclear as to whether Harvey was informed of the strategy to concede guilt and argue for second-degree murder, we remand to the trial court for an evidentiary hearing on this issue. See Nixon v. State, 572 So. 2d 1336 (Fla. 1990), cert. denied, 502 U.S. 854 (1991).

(Emphasis added.) In that 1990 Nixon opinion, this Court did not make a decision that Cronic applied to Nixon. All this Court did was state that it declined to dispose of Nixon's claim on the state of the record at that time.

The point here, though, is that this Court now has before it the very same opening statement by defense counsel that it did in its 1995 consideration of this case. If this Court believed that "trial counsel's comments were the functional equivalent of a guilty plea" and, based upon Cronic, that trial counsel's representation of Harvey was presumptively ineffective, there was no need to remand the case for an evidentiary hearing.

Yet, this Court in 1995 did not hold that Cronic applied based upon the opening statement and did remand for an evidentiary hearing. The trial court held an extensive, six-day evidentiary hearing and entered a thorough and detailed order. In that order, the trial judge, based upon the evidence at the evidentiary hearing which this Court had directed that the trial judge have, found:

> The argument for a second degree conviction is not per se ineffective and is a valid trial strategy, for which there was an evidentiary basis. The facts show a sufficient discussion of the strategy between counsel and defendant before the statement was made to the jury.

State v. Harvey, No. 86-75 CF, order at 11 (Fla. 19th Cir. Ct. order filed Jan. 26, 1999) (emphasis added). The trial court did precisely what this Court ordered eight years ago. I find no basis under the law of this case to now reverse the trial judge on the basis that the present majority of this Court comes to the conclusion that counsel's opening statement, given in 1986, was per se ineffective assistance of counsel.

To the contrary, to grant a new trial to Harvey on this basis is plainly wrong.

An Appeal from the Circuit Court in and for Indian River County,

Dwight Geiger, Judge - Case No. 86-322B

Ross B. Bricker, Jeffrey A. Koppy and Ellen C. Lamond of
Jenner & Block,
Chicago, Illinois,

for Appellant

Charles J. Crist, Jr., Attorney General, and Celia A. Terenzio,
Assistant Attorney General,
West Palm Beach, Florida,

for Appellee

Appendix C

Supreme Court of Florida.
Harold Lee HARVEY, Jr., Petitioner,
v.
Richard L. DUGGER, etc., et al., Respondent.
Harold Lee HARVEY, Jr., Appellant,
v.
STATE of Florida, Appellee.

Nos. 75841, 81836.

Feb. 23, 1995.
Rehearing Denied June 8, 1995.

PER CURIAM.

Harold Lee Harvey, Jr., a prisoner under a sentence of death, petitions this Court for a writ of habeas corpus and appeals the trial court's denial of postconviction relief. We have jurisdiction. Art. V, § 3(b)(1), (9), Fla. Const.; Fla.R.Crim.P. 3.850.

Harvey was convicted of the first-degree murders of William and Ruby Boyd. The facts of the murders are set out in *Harvey v. State*, 529 So.2d 1083 (Fla.1988), *cert. denied*, 489 U.S. 1040, 109 S.Ct. 1175, 103 L.Ed.2d 237 (1989), in which we affirmed Harvey's convictions and sentences of death. After the governor signed a death warrant on March 29, 1990, Harvey filed a petition for writ of habeas corpus with this Court along with a request for stay of execution. This Court issued a stay so that Harvey could seek relief under rule 3.850. Thereafter, Harvey filed a motion for postconviction relief in the trial court. After an evidentiary hearing on one of the claims, the judge entered an order

denying relief and this appeal followed. Harvey also filed a supplemental habeas petition.

3.850 Motion

Harvey raised seventeen claims in his postconviction motion: (1)(a) trial counsel was ineffective for failing to make several arguments in support of his motion to suppress Harvey's confession;[1] (1)(b) trial counsel was ineffective for failing to challenge juror Brunetti for cause or peremptorily after she stated she could not be impartial; (1)(c) trial counsel was ineffective for failing to object to the trial court's change of venue to Indian River County; (1)(d) trial counsel was ineffective for making claims in his opening statement that were not later established; (1)(e) trial counsel was ineffective for failing to raise a valid objection to the admission of hearsay testimony relating to Harvey's pretrial escape; (1)(f) trial counsel was ineffective for admitting Harvey's guilt during opening statements; (2)(a) trial counsel was ineffective for failing to adequately investigate and present mitigating evidence; (2)(b) trial counsel was ineffective for failing to establish the substantial domination

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[1] Harvey maintains that the following arguments should have been made: (a) Harvey invoked his right to counsel when he was booked into the jail, but the police ignored his request; (b) the initial *Miranda* warnings that were given were incomplete and misleading; (c) Harvey invoked his right to counsel during questioning, but his request was ignored; and (d) Harvey was not promptly taken before a judicial officer for his first appearance. The claim also asserted that trial counsel failed to obtain the services of a psychiatrist who would have testified that Harvey suffered from organic brain damage and was subject to becoming quickly and easily confused in stressful situations. The claim further asserted that trial counsel failed to effectively argue that the police refused to allow a public defender to speak with Harvey and coerced Harvey into making a confession by using a visitation with his wife as a bargaining tool.

mitigating factor; (2)(c) trial counsel was ineffective during his penalty-phase closing argument; (2)(d) trial counsel was ineffective for failing to waive the no significant history mitigating factor; (2)(e) trial counsel was ineffective for allowing the State to anticipatorily rebut evidence of remorse when such an argument was not made; (2)(f) trial counsel was ineffective for failing to present evidence or argument at the final sentencing hearing; (2)(g) trial counsel was ineffective for failing to investigate and confirm that the victims overheard Harvey and the co-defendant deciding to kill them; (3) trial counsel was ineffective for failing to ensure that Harvey received a competent mental health examination; (4) Harvey was tried by a de facto eleven-person jury; (5)(a) the trial court rendered trial counsel ineffective by refusing to hear and rule on Harvey's motion to suppress prior to jury selection; (5)(b) the trial court rendered trial counsel ineffective by denying counsel's motion for co-counsel; (5)(c) the trial court rendered trial counsel ineffective by denying counsel's motion for continuance made between the guilt and penalty phases of the trial; (6) the trial court failed to expressly evaluate all mitigating factors, failed to find each proposed mitigating circumstance, and failed to weigh those factors against the aggravating factors; (7) fundamental changes in the law require resentencing because the trial court improperly rejected the no significant history mitigating factor based on offenses committed after the murders but before sentencing; (8)(a) the trial court failed to properly instruct the jury regarding the heinous, atrocious, or cruel and cold, calculated, and premeditated aggravating factors; (8)(b) the penalty-phase jury instructions and the prosecutor's closing argument precluded the jury from considering sympathy in recommending a sentence; (8)(c) the trial court erred in refusing to answer two jury questions relating to when Harvey would be eligible for parole and whether life sentences would be imposed consecutively; (8)(d) the trial

court erred in denying Harvey's special requested penalty-phase instructions; (9) the penalty-phase jury instructions improperly shifted the burden to Harvey to prove that the mitigating factors outweighed the aggravating factors, and trial counsel was ineffective for failing to object to them; (10) the heinous, atrocious, or cruel instruction was unconstitutionally vague, and trial counsel was ineffective for failing to object to the lack of a limiting instruction; (11) the cold, calculated, and premeditated instruction was unconstitutionally vague, and trial counsel was ineffective for failing to object to the lack of a limiting instruction; (12)(a) the State withheld the fact that witness Griffin had been used as a jail-house informant in other cases; (12)(b) the State withheld the fact that Harvey requested counsel after his arrest; (13) Florida Rule of Criminal Procedure 3.851 violates Harvey's rights to due process, equal protection, and access to the courts; (14) the jury was improperly instructed that its role was merely advisory; (15) the State improperly argued victim-impact evidence; (16) trial counsel was ineffective for failing to object to the admission of evidence that Harvey threatened to kill a fellow inmate; and (17) Florida's system for funding the defense of indigent capital defendants violates due process and equal protection.

At the outset, we find no merit to claims 12(a), 12(b), 13, 15, and 17, and we dismiss those claims without discussion. Also, issues that could have been, but were not, raised on direct appeal are not cognizable through collateral attack. *Johnson v. State*, 593 So.2d 206 (Fla.), *cert. denied*, 506 U.S. 839, 113 S.Ct. 119, 121 L.Ed.2d 75 (1992). Therefore, claims 5(a), 5(b), 5(c), 6, 8(c), and 9[2] are procedurally barred from review in this proceeding because they could have been

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[2] The portion of claim 9 pertaining to ineffective assistance of counsel will be discussed in another part of this opinion.

raised on direct appeal. Further, postconviction proceedings are not to be used as a second appeal. *Swafford v. Dugger*, 569 So.2d 1264, 1267 (Fla.1990). Therefore, claims 8(b), 8(d), and 14 are procedurally barred as these issues were raised on direct appeal. It is also not appropriate to use a different argument to relitigate the same issue. *Medina v. State*, 573 So.2d 293, 295 (Fla.1990). Hence, claim 1(a) is procedurally barred, with the exception of the portion of the claim relating to the booking sheet, because the issue of the suppression of Harvey's confession was raised on direct appeal and rejected by this Court. Claim 1(e) is also procedurally barred as the issue of evidence of Harvey's pretrial escape was raised on direct appeal.

The trial court held an evidentiary hearing on issue 1(b), in which Harvey argued that trial counsel was ineffective during the voir dire for failing to challenge juror Brunetti.[3] During voir dire, Brunetti had stated that she could not be impartial because she had read in the newspaper and heard on television that Harvey had confessed to the crime. Harvey's trial counsel, who had previously worked on many other capital cases, testified that because of the strong evidence of guilt and the fact that Harvey's motion to suppress the confession had been denied, he had concluded that there was no chance of obtaining an acquittal. While he had no independent recollection of juror Brunetti, upon reviewing the transcript he concluded that her responses indicated that she was receptive to psychological testimony. In the course of her testimony, she had observed that while the death penalty was a deterrent to the person sentenced, she did not "necessarily believe that two wrongs made a right." Harvey's counsel expressed the opinion that it was reasonable

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[3] When one of the jurors became ill, alternate Brunetti was seated as a juror.

strategy to accept juror Brunetti and concentrate on the penalty phase.

We hold that there was competent and substantial evidence to support the lower court's finding that defense counsel made a reasonable decision not to challenge Brunetti based on his strategy of attempting to find jurors likely to recommend a life sentence instead of the death penalty. Thus, Harvey has failed to demonstrate that counsel's performance was deficient during the voir dire. We likewise reject Harvey's claim 4 that he was tried by a de facto eleven-person jury.

In claim 1(f), Harvey argues that he was denied effective assistance of counsel in the guilt phase of the trial when without his consent, defense counsel conceded Harvey's guilt in the opening argument. Harvey maintains that this concession nullified his fundamental right to have the issue of guilt or innocence presented to the jury as an adversarial issue. Because the record before us is unclear as to whether Harvey was informed of the strategy to concede guilt and argue for second-degree murder, we remand to the trial court for an evidentiary hearing on this issue. *See* Nixon v. State, 572 So.2d 1336 (Fla.1990), *cert. denied,* 502 U.S. 854, 112 S.Ct. 164, 116 L.Ed.2d 128 (1991).

Harvey also contends in claim 1(a) that he was denied effective assistance of counsel in the guilt phase when his trial counsel failed to argue for suppression of Harvey's confession based on a copy of a booking sheet. In his 3.850 motion, Harvey appended a copy of a booking sheet with his name on it which indicated that he wished to speak to an attorney. The copy of the booking sheet bears no time or date. Harvey claims that the booking sheet was generated at 6:35 a.m. on the day of his arrest. Therefore, Harvey argues that the booking sheet would have been important in his motion to suppress because it preceded his confession.

Harvey further claims that the copy of the booking sheet was in his trial counsel's files at the time he moved to suppress Harvey's confession.

If authentic and if signed at 6:35 a.m., the booking sheet might bear on Harvey's claim of ineffective assistance of counsel in relation to the motion to suppress. We do not feel that this claim can be resolved without an evidentiary hearing and therefore remand to the trial court.

We also find merit to Harvey's claims 2(a) and 3 regarding ineffective assistance of counsel during the penalty phase. The sentencing court found four aggravating factors[4] and as a mitigating circumstance found that Harvey had a low I.Q. and poor educational and social skills. During the penalty phase, defense counsel presented seventeen witnesses including Dr. Petrilla, a clinical psychologist who conducted psychological testing on Harvey. These witnesses testified that Harvey came from a loving family and was a decent, dependable, hard-working individual. The evidence presented also tended to prove that Harvey was of below normal intelligence, was depressed, and was a quiet and passive person. The evidence was intended to show that Harvey had many socially redeeming qualities and deserved mercy from the jury.

In his 3.850 motion, collateral counsel presented substantial mitigating evidence depicting Harvey's childhood as deprived and violent and portraying Harvey as a person with

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[4] The murders were found to be (1) especially heinous, atrocious, or cruel; (2) committed for the purpose of avoiding lawful arrest; (3) committed in a cold, calculated, and premeditated manner; and (4) committed during the commission or the attempt to commit robbery or burglary. § 921.141(5)(d), (e), (h), (i), Fla.Stat. (1983).

a history of substance abuse. In addition, affidavits made by a psychiatrist state that Harvey suffered from organic brain damage and debilitating depression at the time of the offense. Harvey also alleges that Dr. Petrilla recommended to defense counsel that Harvey be evaluated by an experienced psychiatrist. We believe that this allegation along with the evidence contained in the pleadings is sufficient to require an evidentiary hearing to determine whether defense counsel was ineffective for failing to uncover and introduce this evidence at trial.

A number of Harvey's other penalty phase claims relating to ineffectiveness of counsel do not appear to be such as would warrant relief under the prejudice prong of *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). However, the cumulative effect of such claims, if proven, might bear on the ultimate determination of the effectiveness of Harvey's counsel. Therefore, in view of the fact that we have already determined to remand for an evidentiary hearing on Harvey's penalty claims 2(a) and 3, we also remand his penalty claims 2(b), 2(c), 2(d), 2(e), 2(f), 2(g), and 16 for consideration at the same time.[5]

Harvey argues in claim 7 that the mitigating circumstance of lack of a significant history of prior criminal activity[6] existed in Harvey's case because of *Scull v. State*, 533 So.2d 1137 (Fla.1988), *cert. denied*, 490 U.S. 1037, 109 S.Ct. 1937, 104 L.Ed.2d 408 (1989), which was decided after *Harvey*. In *Scull*, we found when considering the existence of this mitigator, the term "prior" means before the commission of

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[5] Harvey's penalty phase claim 9 to the extent it pertains to ineffective assistance of counsel is without merit as a matter of law.

[6] § 921.141(6)(a), Fla.Stat. (1983).

the murder. In the instant case, the basis of the trial court's rejection of this mitigator was because Harvey had escaped from jail while awaiting trial on the murder charges. We reject Harvey's contention because at the time of Harvey's sentencing, the law provided that any significant criminal activity "prior" to sentencing precluded the finding of this mitigating circumstance. *Ruffin v. State*, 397 So.2d 277 (Fla.), *cert. denied*, 454 U.S. 882, 102 S.Ct. 368, 70 L.Ed.2d 194 (1981). *Scull* was not a fundamental change in the law that requires retroactive application. *See Lucas v. State*, 568 So.2d 18 (Fla.1990) (prosecutor's jury argument that mitigation of no significant prior history of criminal conduct should be rejected because of contemporaneous criminal conduct in violation of *Scull* was not fundamental error).

Finally, Harvey argues in claims 10 and 11 that both the standard jury instructions on the heinous, atrocious, or cruel and cold, calculated, and premeditated aggravators given in this case were unconstitutionally vague.[7] Because Harvey did not object to these instructions or request legally sufficient alternative instructions, these claims are procedurally barred. Further, Harvey's trial counsel cannot be deemed ineffective under the test set out in *Strickland* for failing to object to these instructions when this Court had previously upheld the validity of these instructions. *See Kight v. Dugger*, 574 So.2d 1066 (Fla.1990); *White v. Dugger*, 565 So.2d 700 (Fla.1990); *Ruffin v. Wainwright*, 461 So.2d 109 (Fla.1984). Harvey's claim 8(a) that the trial court failed to properly instruct the jury regarding these circumstances is likewise without merit.

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[7] Harvey raises these claims in light of the United States Supreme Court decision in *Espinosa v. Florida*, 505 U.S. 1079, 112 S.Ct. 2926, 120 L.Ed.2d 854 (1992), and this court's decision in *Jackson v. State*, 648 So.2d 85 (Fla.1994).

Habeas Petition

Harvey raises seven issues in his petition for a writ of habeas corpus: (1) he was denied effective assistance of counsel on direct appeal;[8] (2) the record does not support the heinous, atrocious, or cruel finding; (3) the cold, calculated, and premeditated aggravating factor was not properly found; (4) the trial court improperly rejected the mitigating circumstance of lack of a significant history of prior criminal activity; (5) *Caldwell*[9] error occurred; (6) rule 3.851 as applied to Harvey resulted in a violation of Harvey's constitutional rights; and (7) Florida's system for funding the defense of indigent capital defendants is constitutionally invalid.

Appellate counsel's failure to raise nonmeritorious claims is

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[8] In this claim Harvey argues that appellate counsel was ineffective for failing to: (a) raise the trial court's failure to dismiss juror Brunetti; (b) raise the trial court's denial of Harvey's motion for a new trial based on an alleged *Brady* violation; (c) assert that the trial court did not fully consider all the mitigating circumstances; (d) raise the trial court's denial of the penalty phase instructions requested by Harvey; (e) challenge the trial court's denial of an instruction regarding the mitigating factor of Harvey's substantially impaired capacity to appreciate the criminality of his conduct or to conform his conduct to the law; (f) challenge the trial court's denial of Harvey's motion to appoint co-counsel; (g) argue that the evidence relating to the gun taken from witness Variotto's vehicle was inadmissible under the *Williams* rule and for failing to argue that the flight evidence was improperly admitted; (h) challenge the denial of Harvey's request for a jury instruction supporting his theory of defense; (i) challenge the denial of Harvey's request for an instruction on the underlying felony of burglary; (j) challenge the presentation of victim-impact evidence; and (k) challenge the restriction on cross-examination of the medical examiner.

[9] *Caldwell v. Mississippi*, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985)

not ineffective assistance of counsel. *Swafford*, 569 So.2d at 1266. If appellate counsel had raised the issues now set forth in claim 1, we would have found them to be without merit. Therefore, claim 1 is denied. Claims 2, 3, and 5 were raised on direct appeal and are now procedurally barred. *Smith v. State*, 445 So.2d 323 (Fla.1983), *cert. denied*, 467 U.S. 1220, 104 S.Ct. 2671, 81 L.Ed.2d 375 (1984). Claims 4, 6, and 7 duplicate claims raised in the rule 3.850 appeal discussed previously in this opinion.

Accordingly, we deny the petition for a writ of habeas corpus. We reverse the trial court's summary denial of the postconviction motion as to those issues specified in this opinion as being legally sufficient allegations and remand that portion of the case to the trial court. On remand, the trial court should conduct an evidentiary hearing and rule on the above specified allegations raised in Harvey's motion. We affirm the order denying the motion for postconviction relief on all other issues.

It is so ordered.

GRIMES, C.J., and OVERTON, SHAW, KOGAN, HARDING, WELLS and ANSTEAD, JJ., concur.

Appendix D

IN THE CIRCUIT COURT OF THE NINETEENTH
JUDICIAL CIRCUIT
IN AND FOR THE OKEECHOBEE COUNTY, FLORIDA

STATE OF FLORIDA

VS. CASE NO. 86-75 CF

HAROLD LEE HARVEY, JR.
_____/

AMENDED ORDER ON MOTION FOR POST CONVICTION RELIEF

THIS CAUSE is before the court on motion by Harold Lee Harvey, Jr., for post conviction relief, and the court having considered said motion and the state's response thereto, the remand opinion of Harvey vs. Dugger, 656 So. 2d 1253 (Fla. 1995), evidence presented, and argument and authorities cited, and being otherwise fully advised in the premises, it is

ORDERED AND ADJUDGED

1. That the evidence proves the following facts:

a. Approximately 6:20 A.M. February 27, 1985 Harold Lee Harvey was arrested for two counts of second murder and one count of armed robbery.

He was transported to the Okeechobee County jail and arrived approximately 6:30 A.M. He was partially booked at that time. The booking officer only asked Harvey his name and noted a $3,000,000 bond. Harvey was not asked if he wanted a lawyer.

Harvey was immediately taken to an adjacent office and interviewed by Florida Department of Law Enforcement Officer Pete Lanier, Okeechobee County Chief Deputy O.L. Raulerson and Deputy Sheriff Gary Hargraves. During the interview, which lasted through the afternoon, Harvey made two incriminating statements, one at 3:07 P.M. At no time during the interview did Harvey ask for a lawyer.

b. Although Assistant Public Defender Clyde Killer came to the jail twice to see Harvey during the interview, one time at approximately 2:20 P.M., there is no indication that either Harvey or his family requested Mr. Killer's presence. Mr. Killer did see Mr. Harvey after he had made his statements.

c. A booking sheet was completed on Harvey by Corrections Officer Rose Marie Bennet at approximately 5:50 P.M. while Mr. Killer was present. On the sheet Harvey indicates he wishes to have a lawyer. (Ms. Bennet arrived for her shift that day at 3:40 P.M., and asked Mr. Harvey the question about counsel after that time.)

At 6:10 P.M. a First Appearance hearing was held before County Judge Burton Conner for both Harvey and co-defendant Stiteler.

Mr. Harvey was photographed and finger printed at approximately 7:15 P.M.

d. Later Mr. Harvey tried to cut his wrists with a sharpened coin and also tried to hang himself.

e. Anticipating that Mr. Harvey would be charged with one or more counts of first degree murder, the circuit judge assigned to criminal cases in Okeechobee County asked Attorney Robert J. Watson to represent him, and after interviewing Harvey he consented and was appointed counsel. Mr. Watson had previously participated in the defense of persons charged with potential death

penalty crimes and attended "Life Over Death" seminars. This was his first case as lead counsel in a potential death penalty case.

Mr. Harvey and co-defendant Stiteler were both indicted for two counts of first degree murder; the State indicated it would seek the death penalty as to both.

f. Mr. Watson prepared the case for trial, including obtaining court authorization to employ a psychologist and psychiatrist if necessary. Mr. Watson felt that Harvey was worth saving and that the jury would recommend a life sentence if Harvey was convicted because of the circumstances of the killings and Harvey's life problems and the apparent out of character nature of the killings.

Mr. Watson applied for and received court permission to employ a private court investigator. He discharged the first investigator he hired after approximately five months because the investigator was unable or unwilling to comply with Mr. Watson's requests, although he did obtain statements from approximately 15 witnesses. A second investigator was employed, and this investigator assisted with interviewing of witnesses and concluding trial preparations.

Psychologist Fred Petrilla Ph.D., was retained after court permission and he examined Mr. Harvey. Dr. Petrilla was not given a psycho-social history of the defendant. Harvey also did not discuss the facts of the charges with Dr. Petrilla on advise of Mr. Watson because of a pending motion to suppress Harvey's statements. Dr. Petrilla performed a personality assessment and other psychological tests on Mr. Harvey. Dr. Petrilla's findings and conclusions were that Harvey suffered from post traumatic stress syndrome and had a dependent personality. He did not do a forensic evaluation but did test Harvey's IQ. He

recommended that Mr. Harvey be given anti-depressive medications and receive individual psychotherapy with assertiveness training. He did test Mr. Harvey for organic brain damage but did not diagnose Mr. Harvey as having such damage.

Mr. Watson met with Mr. Harvey's mother and father and siblings and ate dinner in their home on two occasions. He felt they were good, decent people. He also obtained Mr. Harvey's school records. He did not uncover any evidence that Harvey used or abused cocaine or marijuana or quaaludes, that he drove an automobile drunk, or that his parents abused him. He determined that Harvey was involved in a very serious automobile accident at age 16 where he lost consciousness and a female companion was killed. He determined that Harvey had never been institutionalized.

Dr. Petrilla also interviewed the Harvey family and Harvey's co-workers.

On May 22, 1986 Mr. Watson and Dr. Petrilla conferred, and Dr. Petrilla recommended Carmen Ebalo, MD as an examining psychiatrist for Mr. Harvey so that the a expert could verify Dr. Petrilla's opinion and assure that it was comprehensive.

Mr. Watson decided not to employ a psychiatrist because he felt that if there were conflicts between two experts the jury might disregard all the mental health evidence. He also felt that the jury might see calling more than one mental health expert as trying too hard to make a bad excuse for bad behavior because Harvey had never been treated for mental illness.

Mr. Watson did before trial move the court to obtain a postponement between the guilt and penalty phases of the trial, alleging grounds that he wished to obtain a psychiatric

evaluation of Harvey if Harvey was convicted. The motion was denied.

No claim was raised by Mr. Watson concerning the booking sheet in regard to suppression of Harvey's confession. Mr. Watson does not recall ever having a copy of the booking sheet, however a copy was found in his office file by a lawyer subsequently representing Mr. Harvey.

Mr. Harvey never told Mr. Watson that he had asked to talk with a lawyer before he made his confession, and he told Mr. Watson the same version of the events as he told the interrogating police officers.

Mr. Watson and Mr. Harvey discussed a guilty plea if the state would waive the death penalty, however State Attorney Bruce Colton rejected this potential deal, and no deal offer was ever made by the state.

g. Mr. Watson obtained a severance of the two defendants for trial, and Mr. Harvey's trial commenced in June 1986 with jury selection. The trial judge denied Harvey's motion to suppress his confession before the jury was sworn.

Because Mr. Watson felt the confession "was the case," he had discussed with Mr. Harvey during case preparation what his defense could be and that they probably would admit some degree of murder if the confession was not suppressed. They specifically discussed on more than one occasion that if the confession was ruled admissible, Watson would make an opening statement that Harvey was guilty of murder, but that it was second degree murder and not either premeditated or felony murder. Mr. Harvey said he understood this defense tactic.

Watson stated to the jury during his opening statement that the evidence would show a murder was caused by a frightened and confused young Mr. Harvey after he and

his friend had robbed the victims. He stated that Harvey did not intend to kill.

h. Harvey's tape-recorded confession was admitted into evidence as was physical evidence of the crime scene and of the recovery of a murder weapon. The physical evidence and Harvey statement supported a factual finding that the two victims heard Mr. Harvey and Mr. Stiteler arguing concerning the necessity of killing them and then tried to flee. Harvey and Stiteler had brought masks but never put them on, and Mr. Harvey was recognized by the Boyds.

Mr. Watson was concerned about losing credibility with the jury. For this reason felt he should not ague that Mrs. Boyd did not hear the Harvey-Stiteler conversation even though there was also evidence that she was hard of hearing and that the television was turned loud so she could hear it.

Evidence was introduced over Mr. Watson's objection of a death threat by Mr. Harvey toward another county jail inmate while Harvey was awaiting trial. In order then to molify the effect of this testimony, Watson examined the corrections officer witness concerning the mutual nature of the combat and that each of Harvey and the other inmate would have tried to kill the other if given the chance.

Evidence was also introduced that Harvey had escaped while awaiting trial. Mr. Watson's objection of improper prejudice outweighing relevancy was overruled. An escape note beginning with a phrase meaning "It's a good day to die," was admitted.

There was no evidence that Mr. Harvey was under the influence of alcohol or any other drugs the day of the killings.

i. During the jury instruction conference Mr. Harvey participated and personally waived instructions on excusable and justifiable homicide.

During final argument the prosecutor argued that the evidence had not shown everything Mr. Watson had said it would. Mr. Watson objected to this argument as striking at the defendant over the back of his lawyer because he intended to present the additional evidence during a penalty phase if there was a conviction.

Mr. Harvey was found guilty by the jury of two counts of first degree murder.

j. After the guilty verdict Harvey became less motivated to assist his lawyer, however he did not have any difficulty participating in the guilt phase of the trial, and he did appear to understand what occurred during the penalty phase.

During the penalty phase the defendant presented 16 witnesses including Dr. Petrilla who testified that he had been a state's witness in earlier cases and that this was the first time he had testified in a death penalty case for a defendant.

The evidence including Dr. Petrilla's testimony showed that Harvey was depressed, had low self-esteem and a mental age of 18 and physical age of 23, did not have brain damage, and was impulsive. Evidence was also presented that he was hard-working, from a good, decent family who would be negatively effected if he would be executed, that he had been a loving brother to his disabled sister, that the crime was out of character, and that he was pressured by his wife to provide things he could not financially do. Evidence showed that he was involved in the fatal accident at age 16 and would be able to adapt to a life sentence in prison.

Harvey's parents and siblings testified to establish his history, and Mr. Watson provided each with a memorandum of the questions he would ask and the answer he thought they would give.

Harvey chose not to testify during the penalty phase, although he had indicated earlier that he would testify.

k. Mr. Watson did not waive the statutory mitigator of lack of prior significant criminal history even though as of 1986 the existing law defined "prior" as meaning prior to sentence and not prior to offense. This was because the state had already introduced evidence during the guilt phase of Mr. Harvey's escape from jail and theft of a motor vehicle while he was awaiting trial.

Mr. Watson requested a jury instruction on substantial domination, and this was denied.

Mr. Watson then decided not to argue that Mr. Harvey was under substantial domination by another because the evidence showed that Harvey was older than Stiteler, they went to the crime scene in Harvey's car, Harvey was married with marital pressures, and Harvey was the trigger man and had immediately taken the AR-15 from Stiteler's hands immediately before shooting.

Mr. Watson argued that the killings were out of character for Mr. Harvey and emphasized that the killings occurred while Harvey was in a state of panic after the robberies were completed, that there was no intent to kill, and that Harvey's confession showed him to be a remorseful and regretful person, thus maintaining consistency between his guilt and penalty phase positions. The final argument was a well-organized plea for mercy.

The jury recommended the death penalty by a vote of eleven-to one. Neither the state nor Mr. Watson presented

additional evidence to the judge before Mr. Harvey was sentenced.

l. Harold Lee Harvey, Jr., was sentenced to death for two counts of murder in the first degree.

m. During the time Mr. Watson knew Mr. Harvey while working on the trial case, Mr. Harvey's personality did not appear to change. He appeared to be normal and did not act unusual when in Mr. Watson's company. Mr. Watson describes him as a docile client.

n. After conviction and sentence Mr. Harvey was evaluated in 1990 and 1996 by psychiatrist Michael A. Norko, MD. Dr. Norko also interviewed Harvey's mother and two sisters. He states that the Harvey home was abusive and that both parents drank alcohol to excess as did Harvey and his siblings, and that Harvey's automobile accident at age 16 caused him to drink alcohol daily and receive failing grades in school. He relates that Mr. Harvey was in love with a woman who left him in 1982 and that he was a user of cocaine, quaaludes, and LSD. He further states that Harvey married in December 1984 and was unable to make enough money to please his wife. He relates that Harvey's wife made all of the family decisions and that Harvey could not develop a life plan and lacked insight and judgment, and that he exhibited bizarre behavior such as shooting out a street light with a gun. He opines that although Stiteler was the younger of the two, he dominated Harvey and could get him to do almost anything. He also opines that Harvey was suicidal because before the killings he drove a car into a bridge and exhibited "crazy" driving, and put a loaded pistol to his head, and after his arrest cut his wrists, attempted to hang himself, and escaped. He diagnoses Harvey as suffering from an organic brain dysfunction, a major depressive disorder, a dependant disorder, post traumatic stress syndrome and substance abuse and opines that these

diagnoses tend to prove the mitigating factors of lack of capacity to appreciate criminality, domination by another person and extreme mental disturbance.

PhD psychologist Brad Fischer examined and evaluated Mr. Harvey after trial. He met with Mr. Harvey for seven hours in 1990 and conducted clinical testing on him. They discussed the crime. Dr. Fischer also reviewed affidavits of people who knew Harvey and Harvey's medical and school records. He retested Mr. Harvey in August 1998. He concludes that Mr. Harvey was a substance abuser from age 14, that he may have been the victim of pesticide poisoning as a child, and that Mr. Harvey's severe automobile accident resulted in behavior and memory changes. He opines that Mr. Harvey should have been evaluated by a psychiatrist and that the three statutory mitigators of lack of capacity to appreciate criminality, domination by another person and extreme mental disturbance were present at time of trial.

Evidence is now available that Mr. Harvey's mother and father both grew up in poverty-stricken alcoholic homes and married when the senior Mr. Harvey was 20 and Mrs. Harvey was 15. There is evidence that the family did not have enough money for food or routine medical care, that the parents and four children lived in a four bedroom house, that Harvey worked to help with family finances, and that as a child he played in agricultural canals which may have contained pesticides. There is evidence that Harvey's father was an alcoholic and struck him with a stick or belt to discipline him, was abusive to Harvey's mother and that the family was not loving. There is evidence that Harvey's wife was demanding and withheld sex from him. There is evidence that Harvey repeated questions asked of him, played "chicken" with a semi-tractor while drunk and while his sister was in the car with him, that he wrecked two cars, and that he was depressed before his marriage after breaking

up with another girlfriend. There is evidence that on one occasion Harvey choked his sister into unconsciousness and that the severe automobile accident left him a changed person - slower, appearing to "go blank," and having difficulty concentrating. There is evidence that Harvey was hit in the head with a tire iron but did not receive medical treatment and that he used cocaine, marijuana, and alcohol on a daily basis. There is evidence that Harvey's aunt suffers from some form of psychosis and that Harvey's head was 'funny" shaped at birth.

Dr. Petrilla is now qualified as a neuropsychologist and testifies that he may not have correctly evaluated Mr. Harvey's testing concerning possible organic brain dysfunction and organic brain damage. He testifies that he did not know in 1985 and 1986 of his inadequacy to evaluate organic brain damage.

2. That based upon the above facts the following conclusions of law are reached:

Defendant's claim of ineffective assistance of counsel fails for want of proof that his trial counsel's performance was deficient (The second prong of the Strickland v. Washington test is thus not discussed.)

a. Because defendant's booking procedure question whether he wished a lawyer occurred after his confession, introduction of a copy of the booking sheet (which indicates he then wanted a lawyer) during the suppression hearing would have proven no relevant fact.

b. Defendant's trial counsel was not ineffective because of his opening statement to the jury. Key to whether the opening statement was ineffective is whether the strategy of conceding guilt of murder and arguing for a conviction of murder in the second degree had been discussed with Mr. Harvey. The argument for a second degree conviction is not

per se ineffective and is a valid trial strategy, for which there was an evidentiary basis. The facts show a sufficient discussion of this strategy between counsel and defendant before the statement was made to the jury. The facts also show that the concession of guilt of murder was not of guilt of first degree murder and thus not an improper admission of guilty plea.

c. Of the sixteen witnesses called by defendant during the penalty phase, the facts show that none testified that Mr. Harvey used illicit drugs or alcohol, that he had brain damage, that he was violent, or that he was an abused child. (Many of these same witnesses now seek to prove these facts.) The trial strategy was to show defendant as a good person who had a positive family upbringing. This was done. Speculating now that another strategy may have produced a different result does not show ineffectiveness.

d. Mr. Watson proved that Harvey was depressed and unable to support his wife, suffered from low self esteem, was insecure, immature, anxious, guilt-ridden, suicidal, remorseful, possessed of a low IQ, the victim of a tragic automobile accident, and able to adapt to a prison environment. These establish that Mr. Watson effectively presented a valid sentencing hearing defense.

e. Mr. Watson was concerned about Harvey's mental health - both his competency to stand trial and whether there were mitigators that might be proven in a sentencing hearing. The expert who examined the defendant, Fred Petrilla, PhD, testified that Harvey did not have brain damage and that he suffered from a dependant personality disorder and proved the mental state of defendant referred to above. The experts who have later examined defendant concede that there is no expert proof of any particular cause of brain damage. Self-inflicted drug and alcohol use, an automobile accident, being hit in the head with a tire iron,

swimming in drainage canals, and being born with a "funny" shaped head are seen only as possible causes of brain damage. There is not a showing of ineffective assistance of counsel for failure to ensure a competent mental health examination.

f. Also evidence of defendant's choking his sister, shooting out a streetlight, and playing "chicken" with another vehicle while his sister was a passenger in his car would have been placed before the jury if defendant's current mental health experts had testified. This evidence would certainly have undermined the "good person" defense.

g. Omission of evidence that was not discovered before trial (and which may not even have been available and which may have been detrimental to defendant) in this case does not show ineffective assistance.

h. The evidence available to and presented by defense counsel at trial, which included the defendant's statements, was not legally sufficient to require the court to give a jury instruction that defendant was under the substantial domination of another. The instruction was requested and denied. The fact that there are now experts who state they would give opinions of substantial domination does not show ineffective assistance, particularly; as here, where the expert who examined the co-defendant opined that the co-defendant was under the substantial domination of Mr. Harvey.

i. The plea for mercy final argument was not ineffective assistance of counsel.

j. Evidence of Harvey's escape from jail was introduced during the guilt phase of the trial. The only crime for which defendant was convicted before the murders was a misdemeanor. Not waiving the mitigating factor of lack of prior record was not ineffective.

k. As noted above defense presented evidence at trial of remorse and that defendant would do well in prison. The state could validly argue whether these factors were proven, as in the case of any factor the defense was contending. This cannot be construed to be ineffective.

l. Failure to argue further before the judge alone prior to actual sentencing and failure to argue a matter that could result in loss of credibility with the jury are neither ineffective.

m. Mr. Watson objected on relevancy grounds to the introduction of evidence that Harvey threatened to kill a fellow jail inmate. When the objection was overruled, and he introduced evidence to prove that the incident was incited by the other inmate, this was not ineffective.

n. The overall and specific effects of Mr. Watson's efforts were effective assistance of counsel.

3. That the motion for post-conviction relief is denied.

4. That defendant has the right to appeal within 30 days of the rendition of this order.

DONE AND ORDERED this 26th day of January 1999 in chambers.

/s/Dwight L. Geiger
DWIGHT L. GEIGER,
CIRCUIT JUDGE

cf: Lawrence Mirman, Esq.
Ross B. Bricker, Esq.

I hereby certify that a copy of the above order has been served upon the defendant by U.S. Mail this _____ day of January 1999.

SHARON ROBERTSON
CLERK OF CIRCUIT COURT

By:_____
as Deputy Clerk

Appendix E

IN THE CIRCUIT COURT
OF THE NINETEENTH JUDICIAL CIRCUIT
IN AND FOR INDIAN RIVER COUNTY, FLORIDA

STATE OF FLORIDA

VS. CASE NO. 86-322B

HAROLD LEE HARVEY, JR.

ORDER DENYING MOTION FOR POST-CONVICTION RELIEF

THIS CAUSE is before the court on motion by the above defendant for post-conviction relief under provision of Rule 3.850, Florida Rules of Criminal Procedures, and the court having considered said motion and the State's response thereto and the files and records in this case, and further having considered evidence and argument of counsel, and being otherwise fully advised in the premises, it is

ORDERED AND ADJUDGED

1. That the motion and the files and records in the case conclusively show that defendant is entitled to no relief on his Claims IA., IC., ID., IE., IF., and all of Claims II, III, IV, V, VI, VII, VIII, IX, X, XI, XII, XIII, XIV, XV, XVI, and XVII. A copy of that portion of the files and records in this case which conclusively show defendant is entitled to no relief on these claims is attached hereto.

2. That after an evidentiary hearing on Claim IB. of defendant's motion, the court determines that defendant is not entitled to relief, defendant having neither proven serious errors that denied him of his right to counsel nor actual

prej[illegible]e that deprived him of a fair trial. See Strickland v. Wash[illegible]ton, 466 U.S. 664 (1984).

3. That defendant's motion for post-conviction relief is denied.

4. That defendant has the right to appeal within thirty days of the rendition of this order.

DONE AND ORDERED this 17th day of March 1993 in chambers.

/s/Dwight L. Geiger
DWIGHT L. GEIGER, Circuit Judge

cf: Celia A. Terenzio, Esquire
Steven F. Samilow, Esquire
David C. Morgan, Esquire

(copies of attachments furnished to Celia A. Terenzio and Steven F. Samilow.)

I hereby certify that a copy of the above order has been served upon the defendant by U.S. Mail this __ day of March 1993.

JEFFREY K. BARTON
Clerk of the Circuit Court

By: _____
as Deputy Clerk

Appendix F

SUPREME COURT OF FLORIDA

MONDAY, JANUARY 8, 2007

CASE NO.: SC95075
Lower Tribunal No.: 86-322B

HAROLD LEE HARVEY vs. STATE OF FLORIDA,

Appellant(s) Appellee(s)

Appellant's Motion for Rehearing is hereby denied.

LEWIS, C.J., and WELLS, ANSTEAD, PARIENTE, QUINCE, CANTERO and BELL, JJ., concur.

A True Copy
Test:

/s/Thomas D. Hall
Thomas D. Hall
Clerk, Supreme Court

kb
Served:

HON. LAWRENCE M. MIRMAN
HON. WILLIAM L. ROBY, CHIEF JUDGE
ELLEN C. LAMOND
ROSS B. BRICKER
JEFFREY A. KOPPY
CELIA A. TERANZIO

LESLIE CAMPBELL
HON. SHARON ROBERTSON, CLERK
HON. JEFFREY BARTON, CLERK

Appendix G

SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. Const. amend. VI.

Appendix H

IN THE CIRCUIT COURT OF THE NINETEENTH JUDICIAL CIRCUIT, IN AND FOR INDIAN RIVER COUNTY, FLORIDA

CASE NO. 86-322B

HAROLD LEE HARVEY, JR.,	)
	)
Plaintiff, Appellant,	)
	)
vs.	)
	)
STATE OF FLORIDA,	)
	)
Defendant, Appellee.	)

TRANSCRIPT OF TRIAL

Friday, June 13, 1986

VOLUME VI

JURY SELECTION

Trial before the Honorable Dwight L. Geiger, Circuit Judge, held at the Indian River County Courthouse, Vero Beach, Florida, commencing at 11:00 a.m. on the day and date above set forth.

what you tell us may affect another juror, so we want to avoid that. And that's the reason we have talked with the jurors in chambers rather than out there if they know something about the case.
What we'll do in your situation is I'll talk with you about that and then I'll let the lawyers talk with you about any questions at all that they wish to ask of you.
MRS. BRUNETTI: Okay.
THE COURT: And we probably will not go back into the courtroom and talk with you further back in the courtroom again.
First off, let me mention that the charge which is made here is charged to have occurred, the offense which is charge here, is charged to have occurred in May of 1985, and that's about a year and a half ago.
MR. WATSON: February.
MR. COLTON: February.
THE COURT: Excuse me, February of '85. You're ahead of me. It's been a long week.
Again, about a year and a half ago. There was news coverage of that particular event at that time plus there has been news coverage at various times since then. News coverage has been on television, channel 34, and one or more of the West Palm Beach stations have had coverage.
MRS. BRUNETTI: Yes.

THE COURT: The Press Journal has had some coverage, the Miami Herald has had coverage; other newspapers have had coverage.
There has been coverage on at least one Vero Beach radio station as well.
Now, do you know anything about this case other than from news coverage?
MRS. BRUNETTI: Just what I read and what I saw on the TV.
THE COURT: Has anyone who may have direct knowledge themselves about the case told you something about it?
MRS. BRUNETTI: No.
THE COURT: Okay. Now, you've seen something on television; is that correct?
MRS. BRUNETTI: And the Miami Herald.
THE COURT: And the Miami Herald, okay. When did you come in contact with this coverage?
MRS. BRUNETTI: Well, last year when it happened. And I can't tell you what date but I read the paper every day and I watch the news every night.
THE COURT: What do you recall?
MRS. BRUNETTI: Well, I recall that he confessed to doing it and that's why I feel that I couldn't be, you know, impartial about it

THE COURT: Why do you think there was a confession?
MRS. BRUNETTI: Because I think he did it. I think he did it and he confessed to doing it.
THE COURT: Why do you think there was a confession? Was that in the news coverage?
MRS. BRUNETTI: I think I read that he confessed to it, or I saw it on the TV.
THE COURT: You know there is more than one person that was charged?
MRS. BRUNETTI: Yes, two. There are two.
THE COURT: What was the name of the person who confessed; do you know that?
MRS. BRUNETTI: Harvey.
THE COURT: You're sure of the name?
MRS. BRUNETTI: Yes.
THE COURT: Do you know the name of the other who was charged?
MRS. BRUNETTI: I saw it but I can't remember exactly what his name is.
THE COURT: What else do you recall about the case?
MRS. BRUNETTI: I just recall seeing it and reading it in the paper that two people were murdered.
THE COURT: Do you recall any of the incidents about the events?

MRS. BRUNETTI: That it was a robbery case. They robbed the people and that they had a big dairy farm or something, farmers of some kind.
THE COURT: What you recall about the case or think you recall about the case, would that affect your ability to be fair and impartial here and confine your decision in the case only to the evidence and the law that I will instruct you?
MRS. BRUNETTI: I don't think I could be impartial after reading about it.
THE COURT: Do you know anything about Mr. Harvey individually?
MRS. BRUNETTI: No.
THE COURT: From any source?
MRS. BRUNETTI: No. Just that he was, he and another boy and what they have said here is all.
THE COURT: Mr. Colton?
MR. COLTON: When you read in the paper or saw on the news that he had confessed, did it say in what you saw what it was that it was in his confession or just the fact that he had confessed?
MRS. BRUNETTI: I think it said that he had confessed to killing them.
MR. COLTON: But did it go into any detail as to what the confession was?

MRS. BRUNETTI: I can't remember. I don't think so.
MR. COLTON: Okay.
MRS. BRUNFTTI: Just said that he had signed a confession. That he had been apprehended.
MR.. COLTON: One of the instructions on the law that the Judge will give you is that you're to put aside anything that you read or heard about the case and form your verdict based on the evidence that you heard in the courtroom; could you do that?
MRS. BRUNETTI: I don't know if I honestly could.
MR. COLTON: Okay. That's all that I have.
MR. WATSON: I have a few questions, Judge.
THE COURT: Yes, sir.
MR. WATSON: Mrs. Brunetti, where are you from originally?
MRS. BRUNETTI: I'm born and raised south of Buffalo, New York.
MR. WATSON: How many years did you live there?
MRS. BRUNETTI: Until I was about 20.
MR. WATSON: Where did you go to after you left there?
MRS. BRUNETTI: I lived in New York for a year and then I came to Florida.
MR. WATSON: In New York City?

MRS. BRUNETTI: Yes, about a year.
MR. WATSON: Okay. Where did you live in Florida when you first got here?
MRS. BRUNETTI: First I lived in Fort Lauderdale and then Hallandale.
MR. WATSON: You worked at the water department there?
MRS. BRUNETTI: At the City of Hallandale.
MR. WATSON: Your name sounds a little bit familiar. Do you have any children, ma'am?
MRS. BRUNETTI: No, I don't.
MR. WATSON: No? Okay. How long have you lived in Vero?
MRS. BRUNETTI: Eight years approximately.
MR. WATSON: What part of the community do you live in?
MRS. BRUNETTI: Southwest; Pinecrest.
MR. WATSON: Okay. Do you remember when you saw or heard the publicity? Was it about a year and some ago or was it just recently? Because there has been different times of publicity.
MRS. BRUNETTI: No. When it first happened there was a big article about it. That's when I first saw it and I then saw it in the news.
MR. WATSON: What is your present perception as to

what happened based upon those articles?
MRS. BARNETTI : Well, I think they broke in, is the best that I can remember, and they robbed them or something and then they were afraid they would be identified
and they killed them.
MR. WATSON: Okay. Do you have any feeling at this time if that's what happened what the punishment would
be in that situation if that should happen?
MRS. BARNETTI: I'm kind of confused on the death penalty after listening to all of these different people. I think it's a deterrent because a person would not be able to
get out to do the same thing again. But I don't necessarily
believe that two wrongs make a right.
MR. WATSON: Okay. When you have some spare time,
ma'am, what types of things do you like to do?
MRS. BRUNETTI: I fish and I dance and I swim, ceramics.
MR. WATSON: Okay.
MRS. BRUNETTI: Jog.
MR. WATSON: And have you ever had any conversations with friends or relatives about psychology?
MRS. BRUNETTI: I have a sister that went to a psychologist for two years.
MR. WATSON: Do you think she was benefited or hurt by that experience?

MRS. BRUNETTI: She was benefited.
MR. WATSON: You mention that someone in your is in family was in law enforcement; is that right?
MRS. BRUNETTI: My brother-in-law for 26 years in Hallandale, he was a police sergeant.
MR. WATSON: Maybe that's why your name sounds familiar. What is his name?
MRS. BRUNETTI: Harold Cool.
MR. WATSON: Oh, that's not why it sounds familiar.
MRS. BRUNETTI: It's my sister's husband. He's deceased.
MR. WATSON: He is?
MRS. BRUNETTI: Yes.
MR. WATSON: Did he die as a result of illness or accident?
MRS. BRUNETTI: Illness.
MR. WATSON: When you say that you think he did it, do you mean that you think that he shot the people or when you say you think that he did it, do you mean you think he committed a certain crime?
MRS. BRUNETTI: I feel that he committed the crime that he was charged for.
MR. WATSON: First degree murder?
MRS. BRUNETTI: Yes.

MR. WATSON: But the Judge hasn't given you the instructions.
MRS. BRUNETTI: I know.
MR. WATSON: But from what all you said up there that's what, you know -- you've come to a conclusion as to what first degree murder is based upon what Mr. Colton and I said?
MRS. BRUNETTI: Yes.
MR. WATSON: You think that that falls into this category?
MRS. BRUNETTI: Yes.
MR. WATSON: Do you feel because Mr. Colton and I may not have explained to you as well as the Judge would later, do you think you could follow the Judge's instruction?
MRS. BRUNETTI: I can't honestly say that I could have an open mind after reading it and seeing it on the news. I have to be honest. I wouldn't want to get on the jury and not say what I feel.
MR:. WATSON: Okay. I don't have any other questions.
MR. COLTON: Neither do I.
THE COURT: You may step back into the courtroom, ma'am. Thank you.
MRS. BRUNETTI: Thank you.

THE COURT: Motions?
MR. COLTON: No motion, Your Honor.
MR. WATSON: No motion, Your Honor.
THE COURT: Are there any preemptories?
MR. COLTON: No.
MR. WATSON: No.
THE COURT: These two jurors will be our alternate jurors then?
MR. COLTON: Yes.
THE COURT: Okay. Let's go in, we'll swear them and we'll move ahead then.
(End chambers discussion)
THE COURT: Counsel, approach the bench for a moment.
(Following side-bar discussion was held out of the hearing of potential jurors)
THE COURT: Just so I understand, there is no motions for cause that have been made at this time?
MR. WATSON: That's correct.
THE COURT: State is not making a motion?
MR. COLTON: No.
MR. WATSON: Defense isn't making any motion for cause.
THE COURT: There are no preemptories at this time?

IN THE CIRCUIT COURT OF THE NINETEENTH JUDICIAL CIRCUIT, IN AND FOR INDIAN RIVER COUNTY, FLORIDA

CASE NO. 86-322B

HAROLD LEE HARVEY, JR., Plaintiff, Appellant,	)
vs.	)
STATE OF FLORIDA,	)
Defendant, Appellee.	)

TRANSCRIPT OF TRIAL

Friday, June 13, 1986

Monday, June 16, 1986

VOLUME VII

Trial before the Honorable Dwight L. Geiger, Circuit Judge, a jury of twelve, and two alternates, held at the Indian River County Courthouse, Vero Beach, Florida, commencing at 2:45 p.m. on the day and date above set forth.

we would ever salvage Mrs. Ronk as a juror at this stage. It would be very difficult from me to make her serve as a juror in light of the opinion of Dr. Kirby that she should be excused. Of course, all we have got is just a note.

MR. WATSON: We don't care about sanctions. What we care about is losing her as a juror which we think would be a benefit and doctors write notes all the time. My brother is a doctor and he has written some notes for people, I'm sure. But whether or not we need to bring a doctor in and question this juror, maybe we do. But I suppose I'm in the position where we can agree that we can go with the first alternate.

THE COURT: I think at this point the basic question -- and I want the record clear -- I am considering excusing Mrs. Ronk based upon the note from Dr. Kirby. And then that would mean if she is excused Mrs. Brunetti will be seated as a juror then. Is there any objection to doing that at this point?

MR. COLTON: Not for the State.

MR. WATSON: No, none from the Defense.

THE COURT: Okay. Mrs. Ronk is excused and Mrs. Brunetti will be the next juror then. What we will do, Mrs. Brunetti was sworn as an

Appendix I

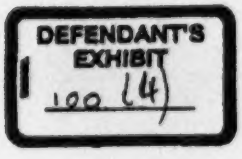
February 26, 1986

RE: HARVEY

MEMO TO FILE

I need to get ahold of a psychiatrist to examine Mr. Harvey. I should probably call one of the Desais in Fort Pierce.

bob/dw



00001703

Appendix J

00002223

PHONE CALL

Harvey

FOR Jose Portillo

DATE 5-22 TIME after 5 A.M. P.M.

PHONE AREA CODE NUMBER EXTENSION

MESSAGE knows a to use

Carmen Ebalo (ASL) Psychiatrist

give her a call + tell her

@ LA Mental Health Center

	TELEPHONED X
	RETURNED YOUR CALL
	PLEASE CALL
	WILL CALL AGAIN
	CAME TO SEE YOU
	WANTS TO SEE YOU

SIGNED

[redacted]

59

(2)

FILED
JUN 22 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

Case No. 06-1368

IN THE SUPREME COURT OF THE UNITED STATES

HAROLD LEE HARVEY, *Petitioner,*

v.

STATE OF FLORIDA, *Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

BRIEF OF RESPONDENT IN OPPOSITION

BILL McCOLLUM
ATTORNEY GENERAL

CELIA TERENZIO*
Bureau Chief, Criminal Appeals

OFFICE OF THE ATTORNEY GENERAL
1515 North Flagler Drive, 9th Floor
West Palm Beach, FL 33401
(561) 837-5000

**Counsel of Record*

QUESTIONS PRESENTED

I. WHETHER CERTIORARI REVIEW IS WARRANTED TO REVIEW A STATE COURT'S RULING WHICH IS MERELY AN APPLICATION OF LONG STANDING PRECEDENT FROM THIS COURT

II. WHETHER CERTIORARI REVIEW IS WARRANTED TO REVIEW A STATE COURT'S RULING WHICH IS MERELY AN APPLICATION OF LONG STANDING PRECEDENT FROM THIS COURT

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STATUTES

28 U.S.C. §1257 1

Case No. _____

IN THE SUPREME COURT OF THE UNITED STATES

HAROLD LEE HARVEY, *Petitioner,*

v.

STATE OF FLORIDA, *Respondent.*

OPINIONS BELOW

The opinion below has been reported as Harvey v. State, 946 So.2d 937 (Fla. 2004), and Harvey v. State, 656 So.2d 1253 (Fla. 1995).

JURISDICTION

Petitioner is seeking jurisdiction pursuant to 28 U.S.C. §1257. Although this is the appropriate provision, the requirements of same have not been met.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Respondent accepts as accurate Petitioner's statement regarding the applicable constitutional provisions involved.

STATEMENT OF THE CASE AND FACTS

Respondent rejects petitioner's statement of the facts as they are incomplete and argumentative. Respondent relies on the facts as recounted below from the direct appeal, the facts recounted in the two postconviction appeals from the Florida Supreme Court, and those facts that appear in the argument section of this response.

The Florida Supreme Court recounted the evidence as follows:

> On February 23, 1985, Harold Lee Harvey met with Scott Stiteler, his codefendant at trial, and drove to the home of William and Ruby Boyd, intending to rob them. Upon their arrival, Stiteler knocked on the front door. In the meantime, Harvey grabbed Mrs. Boyd as she was walking around from the side of the house and took her into the house where Mr. Boyd was located. Harvey had a pistol and Stiteler was holding Harvey's AR-15 rifle which had recently been converted into an automatic weapon. Harvey and Stiteler told the Boyds they needed money. Mr. Boyd then went into the bedroom and got his wallet. Sometime during the course of the robbery, Harvey and Stiteler exchanged guns so that Harvey now had possession of the automatic weapon. After getting the money from the Boyds, Harvey and Stiteler discussed what they were going to do with the victims and decided they would have to kill them. Sensing their impending danger, the Boyds tried to run, but Harvey fired his gun, striking them both. Mr. Boyd apparently died instantly. Harvey left the Boyds' home but reentered to retrieve the gun shells. Upon hearing

> Mrs. Boyd moaning in pain, he shot her in the head at point blank range. Harvey and Stiteler then left and threw their weapons away along the roadway.
>
> On February 27, 1985, Harvey was stopped for a driving infraction in Okeechobee County and subsequently placed under arrest for the Boyds' murders.[1] He was read his Miranda rights at that time. He was then transported to the Okeechobee County Sheriff's Department and again read the Miranda warning. Harvey was questioned and interrogated, and after speaking with his wife, gave a statement in which he admitted his involvement in the Boyds' murders.

Harvey v. State, 529 So.2d 1083, 1084 (Fla. 1988) (footnote omitted). The penalty phase evidence resulted in the finding of the following aggravating and mitigating factors:

> Finally, Harvey attacks the imposition of the death penalty on the premise that there was insufficient evidence to support three of the four aggravating circumstances which were found by the trial judge.[4] Thus, he disputes the findings that the murders were (1) especially heinous, atrocious and cruel, (2) were committed for the purpose of avoiding lawful arrest, and (3) were committed in a cold, calculated and premeditated manner. In determining whether the circumstances of heinous, atrocious and cruel applies, the mind set or mental anguish of the victims is an important factor. Phillips v. State, 476 So.2d 194 (Fla. 1985). Both victims in this case were elderly persons who had been accosted in their home. They became aware of their

impending deaths when Harvey and Stiteler discussed the necessity of disposing of witnesses. In desperation, the Boyds tried to run away, but Harvey shot both of them. When Harvey later came back into the house and realized that Mrs. Boyd was not yet dead, he fired his gun into her head at point blank range. See Hargrave v. State, 366 So.2d 1 (Fla. 1978), cert. denied, 444 U.S. 919, 62 L. Ed. 2d 176, 100 S. Ct. 239 (1979). We find these facts sufficient to support a finding that both murders were especially heinous, atrocious and cruel.

We also find that the murders were committed for the purpose of avoiding lawful arrest. The test is whether the dominant motive behind the murders is to eliminate witnesses who can testify against the defendant. Floyd v. State, 497 So.2d 1211 (Fla. 1986). Both Harvey and Stiteler were known by their victims, and they discussed in the Boyds' presence the need to kill them to avoid being identified.

Finally, the facts support the finding that the murders were committed in an especially cold, calculated and premeditated manner. Rogers v. State, 511 So.2d 526, 533 (Fla. 1987). That Harvey and Stiteler planned the robbery in advance and even cut the phone lines before going over the bridge to the Boyds' home would not, standing alone, demonstrate a prearranged plan to kill. However, once the Boyds were under their control, they openly discussed whether to kill the Boyds. These murders were undertaken only after the reflection and calculation which is contemplated by this statutory aggravating

circumstance. See Rogers v. State, 511 So.2d 526, 533 (Fla. 1987), cert. denied, 484 U.S. 1020, 108 S. Ct. 733, 98 L. Ed. 2d 681 (1988). We hold that the trial judge did not err by concluding that there were insufficient mitigating circumstances to outweigh the aggravating circumstances.[5]

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[4] Harvey concedes the propriety of the finding that the murder was committed while he was engaged in the commission or the attempt to commit robbery or burglary.

[5] The judge found as a mitigating circumstance that Harvey had a low IQ and poor educational and social skills.

Id, at 1087.

REASONS FOR DENYING THE WRIT

CERTIORARI REVIEW IS NOT WARRANTED AS THE STATE COURT' S DETERMINATION WAS PREMISED ON AN APPLICATION OF STRICKLAND v. WASHINGTON, AND FLORIDA v. NIXON; THE DECISION BELOW DOES CONFLICT WITH ANY OTHER FEDERAL OR STATE CASE OPINION AND THE FLORIDA SUPREME COURT' S FACTUAL FINDINGS ARE SUPPORTED BY THE RECORD (CLAIMS I and II restated)

In his initial claim, Harvey urges this court to extend the per se rule of United States v. Cronic, 466 U.S. 648, (1984) to sixth amendment claims involving a trial counsel's strategic decision to allow a "biased juror" to serve in a capital case. In support thereof, he alleges that a conflict exists among the lower federal courts as to whether there should be a presumption of "actual prejudice" when the alleged deficient performance of counsel involves jury selection. Harvey also claims that Florida v. Nixon, 543 U.S. 175 (2004), requires that counsel must confer with his client prior to conceding guilt, and failure to do so requires a finding of per se prejudice. He concludes with arguing that because the Florida Supreme Court erroneously applied the well established rule of Strickland v. Washington, 466 U.S. 668 (1984), instead of Cronic, certiorari review is required. Harvey is incorrect.

First, there is no conflict among the lower federal courts regarding whether Strickland applies in the context of voir dire. Without a doubt, Strickland applies to strategic decisions regarding jury selection. The issue does not expose a question of unsettled federal law. This claim turns completely on its specific facts, which are of no interest to anyone other than the parties

to this litigation, and which are of insufficient importance to justify granting the writ. See Bartlett v. Stephenson , 535 U.S. 1301, 1304 (2002) (issues with few, if any, ramifications beyond the presenting case do not satisfy any of the criteria for exercise of certiorari jurisdiction). . There is no proper basis for certiorari review.

In state collateral proceedings below, Harvey raised an issue of ineffective assistance of counsel based on trial counsel's failure to strike alternate juror Brunetti. Harvey alleged that she should have been stricken based on her statements that she did not think she could be impartial at the guilt phase because she was aware, through a newspaper article, that Harvey confessed to the double murders.[1] Harvey was granted an evidentiary hearing on the issue. In upholding the denial of relief the Florida Supreme Court explained as follows:

> Harvey's trial counsel, who had previously worked on many other capital cases, testified that because of the strong evidence of guilt and the fact that Harvey's motion to suppress the confession had been denied, he had concluded that there was no chance of obtaining an acquittal. While he had no independent recollection of juror Brunetti, upon reviewing the transcript he concluded that her responses indicated that she was receptive to psychological testimony. In the course of her testimony, she had observed that while the death penalty was a deterrent to the person sentenced, she did not "necessarily believe that two wrongs made a right." Harvey's counsel

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[1] The information uncovered by Brunetti was strictly factual and was information that was properly admitted at trial. (Pet. App. C, 43a).

> expressed the opinion that it was reasonable strategy to accept juror Brunetti and concentrate on the penalty phase.
>
> We hold that there was competent and substantial evidence to support the lower court's finding that defense counsel made a reasonable decision not to challenge Brunetti based on his strategy of attempting to find jurors likely to recommend a life sentence instead of the death penalty.

(Pet. App. C, 43a-44a). Respondent asserts that the state courts' determination was a correct determination under the applicable law, i.e., Strickland. Indeed the reasonableness of the ruling was underscored by this Court's more recent decision in Nixon.

In rebuttal Petitioner attempts to create "conflict" among federal courts by alleging that the Sixth Circuit decision in Hughes v. United States, 258 F. 3d 453, 463 (6th Cir. 2001), stands for the proposition that Cronic applies in sixth amendments claims involving juror bias. He further alleges that the Fifth, Eighth, and Tenth Circuits are in express conflict with Hughes.[2] Harvey misreads Hughes.

First, Hughes, a non-capital case, rendered four years before Nixon, does not stand for the proposition that Cronic should apply in claims of juror bias. In fact, to the contrary, the court therein applied Strickland in granting relief. Hughes , 258

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[2] Harvey specifically references Virgil v. Dretke, 446 F.3d 598, 612 (5th Cir. 2006)(ineffective assistance of counsel claims regarding performance at voir dire requires an analysis under the two prongs of Strickland); Hale v. Gibson, 227 F.3d 1298, 1319 (10th Cir. 2000)(same); Johnson v. Armontrout, 961 F.2d 748, 755-56 (8th Cir. 1992)(same).

F.3d at 463.[3] The court explained:

> Under Strickland v. Washington, 466 U.S. 668, 687 (1984), finding ineffective assistance of counsel requires first finding that counsel's performance was objectively unreasonable under the Sixth Amendment, and second, that counsel's deficient performance prejudiced defendant. "Judicial scrutiny of counsel's performance must be highly deferental." Id. at 689.
>
> Counsel is also accorded particular deference when conducting voir dire. An attorney's actions during voir dire are considered to be matters of trial strategy. Nguyen v. Renolds, 131 F. 3d 1340, 1349 (10th Cir. 1997) (citing Teague v. Scott, 60 F. 3d 1167, 1172 (5th Cir. 1995)). A strategic decision is shown to be so ill-chosen that it permeates the entire trial with obvious unfairness.

Id., 457. The Court then framed the issue as follows:

> Petitioner's "claim of ineffective assistance of counsel is grounded in the claim that counsel failed to strike a biased juror. To maintain a claim that a biased juror prejudiced him, however, [Petitioner] must show that the juror was actually biased against him." Goeders v. Hundley, 59 F.3d 73, 75 (8th Cir. 1995) (citing Smith v. Phillips, 455 U.S. 209, 215, 71 L. Ed. 2d 78, 102 S. Ct. 940 (1981)).

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[3] In fact, the opinion does not even cite to Cronic.

Id. (emphasis added). In granting relief therein, the court determined that because the juror was biased[4] and because counsel did not address the bias in any manner, the failure to do so was objectively unreasonable under Strickland. Id., at 460. Clearly, Hughes is not in conflict with any of the other circuits on this issue. To the contrary, it is clear that Strickland is applicable when assessing trial strategy involving voir dire. There is no conflict among the circuits, and review must be denied.

When applying the law to the facts of this case, it is clear that the Florida Supreme Court's decision was correct. In explicitly rejecting the proposition that Cronic should apply to strategic decisions involving concessions of guilt in a capital case, this Court recognized the significance of the penalty phase and the particular considerations that arise which are unique to capital cases. This Court explained:

> Cronic recognized a narrow exception to Strickland's holding that a defendant who asserts ineffective assistance of counsel must demonstrate not only that his attorney's performance was deficient, but also that the deficiency prejudiced the defense... We illustrated just how infrequently the "surrounding circumstances [will] justify a presumption of ineffectiveness" in Cronic itself...

Nixon, 543 U.S. at 190-191 (2004).

Similar to the concerns facing counsel in Nixon, counsel

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[4] The juror stated she could not be fair due to her personal relationships with police officers and detectives in a case where the victim was a federal marshal, who had been robbed at gunpoint.

herein was also focusing his efforts on saving Harvey's life due to the overwhelming evidence of his guilt. Harvey confessed on tape that he shot the elderly defenseless couple because they recognized him during the robbery. The decision to kill them was discussed in front of them. When they attempted to escape, Harvey shot them both. He also admitted that they returned to the scene to collect incriminating evidence. When he heard the female victim moaning, he shot her again. Harvey v. State , 529 So. 2d 1083, 1084 (Fla. 1988). Because of this very damaging evidence, counsel left with very limited strategic choices, reasonably focused most of his efforts on the penalty phase and simply conceded guilt. Herein, counsel sought to retain jurors, including Ms. Brunetti, who would be amenable to the type of mental health mitigating evidence that was to be presented at the penalty phase. That strategy was reasonable under Nixon. Simply because the strategy also encompassed jury selection, does not somehow take the analysis away from Strickland. See Nguyen v. Reynolds, 131 F.3d 1340(10th Cir. 1997)(recognizing that counsel's actions during voir dire are a matter of trial strategy). Harvey's attempt to expand Cronic must be denied

Harvey also asks this Court to apply the *per se* rule of Cronic and recede from Strickland in those instances where counsel fails to first consult with the defendant regarding a strategy involving a concession of guilt. Harvey's claim is not supported by the law or the record in this case.[5]

In Nixon this Court explicitly rejected the suggestion that Cronic should apply when counsel fails to discuss such a strategy

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[5] The record does not support Harvey's claim that no such consultation took place. Counsel testified that he does not remember the specifics in this case, however, he would be shocked to learn that he did not discuss the strategy with Harvey. Harvey did not offer any contrary evidence.

with a defendant. Since Strickland, the law is clear that counsel always has a duty to discuss potential strategies with the defendant. Nixon, 543 U.S. at 178. A failure to do so is a factor to be considered when assessing the reasonableness of counsels' actions. Id. Harvey's request for an explicit rule requiring trial counsel to confer with their client prior to conceding guilt or else prejudice would be presumed, would completely undermine this Court's ruling in Nixon, Strickland and Roe v. Flores-Ortega 528 U.S. 470 (2000)(refusing to impose any bright line requirements on counsel, finding that to be inconsistent with Strickland). Harvey does not offer any sound reason to alter the well established rule of Strickland or its progeny, Nixon.

The Florida Supreme Court, in properly reviewing this issue under the two-prong standard as explained in Strickland, found Harvey to have suffered no prejudice considering the great weight of the evidence against him.

> By stating that Harvey and Stiteler had a conversation in which they discussed the plan to commit murder, trial counsel conceded that Harvey acted with premeditation and, therefore, conceded Harvey's guilt of first-degree murder... However, because Harvey has failed to demonstrate prejudice based on counsel's concession of guilt, we need not address the deficiency prong of Strickland, and we deny 3.850 relief on this issue. See Strickland v. Washington, 466 U.S. at 697, 104 S.Ct. 2052 (holding there is no need for a court deciding an ineffective assistance of counsel claim to address both prongs of the inquiry if there as (sic) been an insufficient showing on one prong). In order to establish prejudice, a defendant must demonstrate that there is a reasonably (sic) probability that the result of the proceeding would have been

> different, but for counsel's unprofessional error. Trial counsel said nothing more to the jury than what Harvey said during his confession to police. The evidence against Harvey was overwhelming even without counsel's admission that Harvey committed first-degree murder. We cannot say, given all of the evidence introduced at trial, there is a reasonable probability that, but for any errors by counsel, the result of the proceeding would have been different, i.e., that our confidence in the outcome has been undermined.

Harvey v. State, 946 So.2d 937, 943-944 (Fla. 2006). The Florida court's decision is squarely in line under both Strickland and Nixon. Harvey has not shown otherwise.

Because the petition presents nothing more than the application of long-standing precedent, and has little significance except for the" parties to this litigation," review must be denied. Rockford Life Insurance Co. v. Illinois Department of Revenue, 482 U.S. 182, 184, n. 3 (1987); Butz v. Glover Livestock Commission C., 411 U.S. 182 (1973) (dissenting opinion); Powell v. Nevada 511 U.S. 79, 86-7 (1994) (Thomas, J., dissenting); Chevron U.S.A., Inc. v. Sheffield, 471 U.S. 1140 (1985) (Stevens, J., on denial of certiorari); Rice v. Sioux City Memorial Park Cemetery, 349 U.S. 70, 79 (1955); see also, Layne & Bowler Corp. v. Western Well Works, Inc., 261 U.S. 387 (1923) ("... it is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public as distinguished from the parties ....").

CERTIORARI REVIEW IS NOT WARRANTED AS THE STATE COURT' S DETERMINATION REASONABLY APPLIED THE STANDARDS SET FORTH IN STRICKLAND IN DETERMINING THAT TRIAL COUNSEL'S DECISION TO FOREGO ONE AVENUE OF MITIGATING EVIDENCE IN ORDER TO PURSUE ANOTHER WAS REASONABLE. (CLAIM III restated)

In his final claim, Harvey asserts that the Florida Supreme Court failed to adhere to this Court's directives under Strickland v. Washington, 466 U.S. 684 (1984) (and emphasized more recently in Wiggins v. Smith, 539 U.S. 510 (2003), and Rompilla v. Beard, 545 U.S. 374 (2005)) in declining to find trial counsel ineffective for what Harvey contends was a complete disregard of certain mitigation evidence. Had trial counsel not abandoned the investigation into petitioner's mental health, he would have unearthed material that may have swayed the jury, or, at the very least, impacted the findings of four of five statutory aggravators accepted by the trial court.[6] This position is meritless. The Florida court's opinion clearly complied with the analysis required by Strickland and its progeny. Moreover, the findings of the state courts are supported by the record. See Bartlett v. Stephenson , 535 U.S. 1301, 1304 (2002) (issues with few, if any, ramifications beyond the presenting case do not satisfy any of the criteria for exercise of certiorari jurisdiction). There is no basis for review.

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[6] (1) the murder was committed while engaged in a robbery or burglary; (2) it was heinous, atrocious, and cruel; (3) it was committed for the purpose of avoiding lawful arrest, and (4) it was committed in a cold, calculated, and premeditated manner. (Pet. App. B, 26a).

On appeal, the Florida court found trial counsel's investigation to be adequate and reasonable. In Harvey v. State, 946 So.2d 937 (Fla. 2004), the court engaged in a Strickland analysis, finding trial counsel to have acted on a sound and reasonable trial strategy.

> While in hindsight counsel could have pursued a different penalty phase strategy, the strategy counsel employed was not unreasonable and did not fall outside the broad range of competent performance "under prevailing professional norms." Strickland, 466 U.S. at 688, 104 S.Ct. 2052. In considering a claim of ineffective assistance of counsel, we must fairly assess trial counsel's performance at the time of trial based on the information he had. "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." Id. at 689.
>
> ...
>
> Harvey has not demonstrated that trial counsel was deficient in his investigation of possible mental health mitigation. This Court has found counsel's performance to be deficient where counsel "never attempted to meaningfully investigate mitigation" although substantial mitigation could have been presented. Rose v. State, 675 So.2d at 572; *947 see also Hildwin v. Dugger, 654 So.2d 107, 109 (Fla.1995) (finding that a woefully inadequate investigation failed to reveal a large amount of mitigating evidence such as prior psychiatric hospitalizations and statutory

> mental health mitigators); State v. Lara, 581 So.2d 1288, 1289 (Fla.1991) (finding counsel virtually ignored preparation for penalty phase). This is not the case here. Consistent with the trial court's factual findings, trial counsel conducted a reasonable investigation into Harvey's mental health background and incorporated his findings into a penalty phase strategy.
>
> Trial counsel explained his strategy at the evidentiary hearing. He chose to present Harvey as a "good person." Trial counsel wanted the jury to see that these murders were inconsistent with Harvey's character and were committed without premeditation in the midst of a robbery gone wrong. Trial counsel testified that he thought about this strategy and decided to implement it after the motion to suppress Harvey's statement was denied. Trial counsel testified that he thought it was important to carry a consistent theme throughout both phases of the trial and believed this was Harvey's best chance for a life sentence. In cases where counsel did conduct a reasonable investigation of mental health mitigation and then made a strategic decision not to present this information, this Court has affirmed the trial court's finding that counsel's performance was not deficient. See Asay v. State, 769 So.2d 974, 985 (Fla.2000). We agree with the trial court and find that trial counsel's strategy was not unreasonable under the circumstances and did not fall outside the range of professional competent assistance.

Id., at 946-947. Despite Harvey's claims to the contrary, the Florida Supreme Court recognized that trial counsel actually did conduct an adequate mental health investigation. The Court

found as follows:

> Harvey alleges that trial counsel failed to fully investigate his background for mental health mitigation. The trial court found, however, that trial counsel retained psychologist Dr. Fred Petrilla, met and ate dinner with Harvey's parents and siblings on two occasions, and obtained Harvey's school records. The trial court also found that Dr. Petrilla interviewed Harvey's family and coworkers and that Dr. Petrilla was given background material concerning Harvey. These findings are supported by the record.
>
> At the evidentiary hearing, trial counsel testified that he was concerned with Harvey's mental health and hired Dr. Petrilla for the purpose of conducting a mental health evaluation. Counsel indicated that he provided Dr. Petrilla with case materials and medical records. Counsel testified that neither Harvey nor Harvey's family gave him any indication of possible mental health mitigators, although they did inform counsel that Harvey had been in a serious car accident when he was sixteen years old. Trial counsel said it was determined that Harvey had never been institutionalized.
>
> ...
>
> Harvey argues that trial counsel was deficient because he did not retain a psychiatrist as Dr. Petrilla had recommended...Although Dr. Petrilla suggested it, trial counsel testified at the evidentiary hearing that he did not employ a psychiatrist because he felt the jury might see calling more than one mental health expert as

> trying too hard to make an excuse for bad behavior, especially given the fact that Harvey had never been treated for mental illness.

Supra, at 945-946.(emphasis addded).

Harvey has not established a sufficient basis for review. This case held true to the directives in Strickland The Florida court's decision is supported by the record; does not present a conflict' nor involve an unsettled question of law. Although Harvey directs this Court's attention to two decisions out of the lower courts, these cases are largely irrelevant.[7] In these cases, trial counsel failed to conduct any sort of meaningful investigation for mitigation. Petitioner's counsel, by contrast, did conduct a meaningful and adequate investigation. The decision to forego further mental health evaluation and concentrate solely on developing Harvey as a "good person" was sound strategy, just as the Florida court held. Review must be denied.

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[7] Daniels v. Woodford, 428 F.3d 1181, 1203-04 (9th Cir. 2005); Commonwealth v. Gorby, 909 A.2d 775, 791 (Pa. 2006).

Conclusion

WHEREFORE based on the relevant case law and factual findings, this Court must DENY certiorari review.

Respectfully submitted,

BILL McCOLLUM
ATTORNEY GENERAL

CELIA TERENZIO
Bureau Chief, Criminal Appeals

OFFICE OF THE ATTORNEY GENERAL
1515 North Flagler Drive, 9th Floor
West Palm Beach, FL 33401
(561) 837-5000

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IN THE

Supreme Court of the United States

HAROLD LEE HARVEY, JR.,
Petitioner,

v.

STATE OF FLORIDA,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Florida

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

DONALD B. VERRILLI, JR.
Jenner & Block LLP
601 13th Street, N.W.
Washington, D.C. 20005
(202) 639-6000

ROSS B. BRICKER*
JEFFREY A. KOPPY
THOMAS P. MONROE
LYDIA M. FLOYD
Jenner & Block LLP
One IBM Plaza
Chicago, Illinois 60611
(312) 222-9350

*Counsel of Record

Attorneys for Harold Lee Harvey, Jr.

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REPLY IN SUPPORT OF PETITION FOR WRIT OF *CERTIORARI*

In his Petition for Certiorari ("Petition") in this capital case, Mr. Harvey asked this Court to grant review for three reasons. The State of Florida's ("State") response brief ("Resp. Br.") raises several new arguments but either concedes or fails to dispute the key factual and legal points supporting a grant of review.

First, Mr. Harvey demonstrated that a true three-way split of authority currently exists in the lower courts as to how *Strickland v. Washington,* 466 U.S. 668 (1984) should be applied in cases where trial counsel fails to strike a juror who describes herself as intractably biased against the defendant. The State's response fails to rebut that showing.

Second, Mr. Harvey showed that the Florida Supreme Court misinterpreted this Court's holding in *Florida v. Nixon* as providing capital trial counsel with unfettered discretion to concede a defendant's guilt without first disclosing that strategy. The State alarmingly misconstrues *Nixon* by arguing that failure to disclose a concession strategy is a mere "factor" to be considered by courts assessing the reasonableness of counsel's actions. *Nixon*, however, held that counsel may implement a concession strategy only when counsel consults with his client about that strategy and the client does not object. The State's misinterpretation of *Nixon* only amplifies the need to clarify that decision.

Finally, Mr. Harvey demonstrated that the Florida Supreme Court did not follow this Court's holdings in *Wiggins v. Smith* and *Rompilla v. Beard*, among others, when it failed to determine whether trial counsel made a reasonable investigation into mitigating circumstances *before* adopting a penalty phase strategy. The State's response does not dispute

Mr. Harvey's showings that (i) there was a plethora of mitigation readily available to trial counsel that he neither investigated nor presented at trial; (ii) red flags existed such that trial counsel had a duty to continue his investigation; or (iii) that had the mitigation evidence been introduced, the balance of weighing mitigating factors versus aggravating factors would have tipped in Mr. Harvey's favor.

A. This Court Should Resolve A Lower Court Split On Whether Counsel's Failure To Strike A Self-Described Biased Juror Constitutes Ineffective Assistance.

In his Petition, Mr. Harvey demonstrated that trial counsel was ineffective for failing to remove an admittedly biased juror from the jury and that there is a split among lower courts as to how *Strickland* should be applied in cases like this one. In its response, the State makes two arguments, both of which are wrong.

1. A lower court split exists.

The State principally argues that the Sixth Circuit did not presume prejudice in *Hughes v. United States*, 258 F.3d 453 (6th Cir. 2001). The State is wrong. In *Hughes*, the Sixth Circuit found counsel's decision to seat a juror who admitted "she did not think she could be fair" was objectively unreasonable because "[t]he question of whether to seat a biased juror is not a discretionary or strategic decision." *Id.* at 463. On the issue of prejudice, the Sixth Circuit unequivocally explained: "The presence of a biased juror . . . requires a new trial *without a showing of actual prejudice. . . . [P]rejudice under Strickland is presumed . . . .*" *Id.* at 463 (citations and quotations omitted; emphasis added).

Other than misconstruing *Hughes*, the State makes no other effort to dispute that there is a three-way split among lower courts. As we showed in our Petition, some courts have held that under the first prong of *Strickland*, counsel can make a reasonable strategic decision to leave a biased juror on the jury. *People v. Metcalfe*, 782 N.E.2d 263, 274-75 (Ill. 2002); *see also* Pet. at 19. Other courts have held that counsel is deficient but that the petitioner must show prejudice. *Virgil v. Dretke*, 446 F.3d 598, 612 (5th Cir. 2006); *see also* Pet. at 19. Still other courts have held that prejudice should be presumed where counsel fails to remove a biased juror. *State v. King*, 144 P.3d 222, 225 (Utah Ct. App. 2006); *Hughes*, 258 F.3d at 463; *see also* Pet. at 18. This Court should resolve the lower court split and find that prejudice should be presumed.

2. The issue of failure to strike a biased juror is not limited to this case.

The State also argues that the presence of a biased juror has "little significance" except for the parties to this litigation. (Resp. Br. at 13.) That argument is untenable because the Sixth Amendment right to an impartial jury is one of the bedrock principles of the criminal justice system. *McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548, 554 (1984) ("One touchstone of a fair trial is an impartial trier of fact-'a jury capable and willing to decide the case solely on the evidence before it.'"); *Tumey v. Ohio*, 273 U.S. 510, 523 (1927); *In re Oliver*, 333 U.S. 257, 278 (1948); *Irvin v. Dowd*, 366 U.S. 717, 722 (1961); *Murphy v. Florida*, 421 U.S. 794, 799 (1975). The Florida Supreme Court's opinion erodes the constitutional protections afforded by the Sixth Amendment by holding that trial counsel, without consent, can waive a defendant's right to a fair and impartial jury. *See Uttecht v. Brown*, 127 S.Ct. 2218, 2231 (2007).

Indeed, the fact that this issue needs this Court's guidance is evidenced by the three-way split among courts that each have considered this issue within the past six years and reached three different conclusions. *See Hughes*, 258 F.3d at 463 (presuming prejudice); *Virgil*, 446 F.3d at 612 (reasonable strategic decision); *Metcalfe*, 782 at 274-75 (finding reasonable strategic decision). While some courts have found that trial counsel can make a reasonable decision to leave a biased juror on the jury, others have not, and of those that have found that counsel's decision is unreasonable, some courts require the defendant to show actual prejudice while others hold that prejudice should be presumed.

B. This Court Should Grant Review To Correct The Florida Supreme Court's Fundamental Misapplication Of *Nixon*.

In his Petition, Mr. Harvey demonstrated that trial counsel conceded his guilt at trial, but failed to disclose that strategy to Mr. Harvey such that Mr. Harvey had no opportunity to object or comment on the strategy, or even to inquire about it. The Florida Supreme Court dangerously misapplied this Court's ruling in *Florida v. Nixon*, 543 U.S. 175, 189 (2004), by finding that trial counsel was not ineffective for failing to disclose that strategy.

Mr. Harvey also showed that, even if concession of guilt to second-degree murder was the "strategy" being attempted by trial counsel, trial counsel botched that strategy by conceding not only second-degree murder (which he intended to do) but also conceding first-degree murder and numerous aggravating factors (neither of which he intended to do). Mr. Harvey showed that under the facts of this case, the Florida Supreme Court should have found that counsel was ineffective and applied the presumed prejudice standard

annunciated by this Court in both *Nixon* and *United States v. Cronic*, 466 U.S. 648 (1984).

Both of these issues warrant review and reversal by this Court to correct the Florida Supreme Court's dangerous extension of *Nixon*.

1. Counsel cannot concede guilt without first consulting the client.

The State does not dispute that trial counsel failed to disclose his concession strategy, but argues that under *Nixon*, his failure to do so was merely "a factor" to be considered in determining whether he rendered ineffective representation under *Strickland*. The State's response demonstrates the danger of allowing the Florida Supreme Court's opinion in this case to stand. The State argues in its response:

> In Nixon this Court explicitly rejected the suggestion that Cronic should apply when counsel fails to discuss [a concession of guilt] strategy with a defendant. . . . *A failure to do so is a factor* to be considered when assessing the reasonableness of counsel's actions.

(Resp. Br. at 11-12, emphasis added.) That position is wholly inconsistent with *Nixon* and undermines a lawyer's professional obligation to his client.

In *Nixon*, this Court went to great lengths to reaffirm that an attorney has a duty to disclose any strategy to concede guilt except in the unusual situation where the client was unresponsive:

> [Counsel] attempted to explain this strategy to Nixon at least three times. . . . Nixon was

> generally unresponsive during their discussions. *Nixon*, 543 U.S. at 181.
>
> *Defense counsel undoubtedly has a duty to discuss potential strategies with the defendant.* *Id.* at 178 (internal citations omitted; emphasis added).
>
> *[Counsel] was obliged to, and in fact several times did, explain his proposed trial strategy to Nixon.* *Id.* at 189 (emphasis added).

Contrary to the State's argument, *Nixon* did not hold that *Strickland* applies in cases where counsel *fails to disclose* a concession strategy. *Nixon*, 543 U.S. at 189; *Strickland*, 466 U.S. at 688. Rather, the holding in *Nixon* must mean that *Cronic* (presumed prejudice) applies where there is a failure to consult with a client about conceding guilt.

Because Mr. Harvey's case is fundamentally different from *Nixon*, *Nixon* does not apply. Here, trial counsel failed to disclose his concession strategy and therefore deprived Mr. Harvey of his right to consent or object to that strategy. Although the State suggests that such consultation took place, the State fails to cite *any* evidence in the record establishing that trial counsel disclosed his concession strategy to Mr. Harvey even though the State attempted to elicit this information at the evidentiary hearing. At that hearing, trial counsel merely testified "he would be shocked to learn" that he did not consult with Mr. Harvey. (Resp. Br. at 11 n.5.) But "shocked to learn" is not evidence of disclosure or consultation, particularly where Mr. Harvey testified that he was not consulted.

By failing to disclose his strategy of conceding guilt to Mr. Harvey, trial counsel deprived Mr. Harvey of the

opportunity to consider, modify or reject that strategy. This Court should grant review and hold that where counsel does not disclose a concession strategy to his client, *Cronic* applies and prejudice should be presumed.

2. Prejudice should be presumed where counsel severely undermines his strategy.

Mr. Harvey also showed that counsel negligently failed to execute his strategy to argue for second-degree murder and instead, conceded Mr. Harvey's guilt to first-degree murder, including aggravating factors. (Pet. at 21-24.)

The State does not dispute this showing. Unlike *Nixon*, where counsel intentionally conceded first-degree murder and tried to focus the jury on the penalty phase, trial counsel here attempted to "tiptoe" through Florida case law to concede only *second-degree*, non-capital murder and therefore avoid the death penalty. That delicate "strategy" backfired when trial counsel systematically conceded every element of first-degree murder and the aggravating factors needed to impose death. The State did not need to prove anything to make Mr. Harvey death-eligible because counsel had already conceded, without authorization or even basic consultation, every aspect of the State's case. Because trial counsel failed to function as a meaningful adversary to the State, prejudice should be presumed.

3. The Florida Supreme Court's ruling will have dangerous repercussions.

The State also argues that this case "has little significance" except to Mr. Harvey and the State. The opposite is true.

The Florida Supreme Court's interpretation of *Nixon* is careless and should not be permitted to stand uncorrected. The Florida Supreme Court's opinion expands the limited holding in *Nixon* to unintended, unconstitutional applications by holding that counsel was not ineffective by: (1) failing to disclose his concession strategy; and (2) conceding first-degree murder and aggravating factors when his "strategy" only called for him to concede second-degree murder.

Under the first part of the Florida Supreme Court's holding, counsel now has unfettered discretion to concede his client's guilt at trial (which is tantamount to pleading guilty) whenever he believes a defense to the charges is hopeless or too difficult to mount – even when the client rejects that strategy or never learns about that strategy. That holding, which is the only reasonable interpretation of the Florida Supreme Court's opinion below, plainly violates *Strickland* and *Nixon*, as well as the rules of professional responsibility governing lawyers. *Strickland*, 466 U.S. at 688; *Nixon*, 534 U.S. at 168.

As to the second part of the Florida Supreme Court's holding, it is impossible to imagine a case where trial counsel could have implemented a concession strategy more negligently and prejudicially than trial counsel did here. Even if *Nixon* permits a defense lawyer to concede his client's guilt (after consultation), it cannot permit counsel to concede guilt to a death-eligible crime when his strategy was limited to conceding guilt to a lesser offense. Profound, prejudicial negligence cannot be strategic. This Court should grant review and reverse in *toto*.

C. Trial Counsel's Mitigation Investigation Violated *Strickland* And Its Progeny.

In his Petition, Mr. Harvey showed that trial counsel failed to investigate substantial mitigation evidence that would have established numerous statutory and non-statutory mitigating factors. Notably, the State does not, and cannot, dispute that trial counsel missed valuable mitigation evidence, including that Mr. Harvey suffers from: (1) Organic Brain Dysfunction; (2) Major Depressive Disorder; (3) Post-Traumatic Stress Disorder; and (4) Substance Abuse Disorders. The State also does not dispute that trial counsel was on notice of "red flags" of significant mental illness that required him to continue his investigation. Indeed, trial counsel intended to have a psychiatric evaluation performed and even wrote himself a note so he would not forget, yet he failed to follow through. Again, profound negligence cannot be strategic

In an attempt to distract this Court from the unreasonableness of trial counsel's investigation, the State focuses on the cursory tasks trial counsel did, such as having dinner with Mr. Harvey's family and retaining a grammar school psychologist to evaluate Mr. Harvey.

The State's argument misses the point of *Wiggins*, *Rompilla*, and this Court's other cases on the appropriate scope of a mitigation investigation. The issue is not what counsel did or did not do; the issue is what he *should have done* based on the information available to him at the time he decided to stop investigating. *Wiggins v. Smith*, 539 U.S. 510, 521 (2003); *Rompilla v. Beard*, 545 U.S. 374, 375 (2005). A mitigation investigation is not a checklist duty that counsel can satisfy by "checking off" basic tasks. A court must consider "not only the quantum of evidence already

known to counsel, *but also whether the known evidence would lead a reasonable attorney to investigate further.*" *Wiggins*, 539 U.S. at 527 (emphasis added). Counsel is deficient if he chooses "to abandon [his] investigation at an unreasonable juncture, making a fully informed decision with respect to sentencing strategy impossible." *Id.* at 527-28. Where red flags exist, counsel must continue his investigation rather than latch on to a mitigation strategy. *Rompilla*, 545 U.S. at 391.

The State does not deny that such red flags existed in this case, including:

- trial counsel's expert (a grammar school psychologist) advised him to hire a forensic psychiatrist to evaluate Mr. Harvey (PCR. v. 10, pp. 81-82.);

- trial counsel wrote himself a note to hire a forensic psychiatrist (Pet. App. I, 83a.);

- trial counsel requested funds from the court to retain a forensic psychiatrist, which was granted (PCR. v. 10, p. 80); and

- trial counsel admitted at the evidentiary hearing that he had concerns about Mr. Harvey's competency to stand trial. (PCR. v. 10, pp. 86-87).

In sum, trial counsel's failure to fully investigate Mr. Harvey's mental health was the result of his own inattention, which is not a strategic decision. *Wiggins*, 539 U.S. at 526.

CONCLUSION

This Court should grant the petition for writ of certiorari.

Respectfully submitted,

DONALD B. VERRILLI, JR.
Jenner & Block LLP
601 13th Street, N.W.
Washington, D.C. 20005
(202) 639-6000

ROSS B. BRICKER*
JEFFREY A. KOPPY
THOMAS P. MONROE
LYDIA M. FLOYD
Jenner & Block LLP
330 North Wabash
Chicago, Illinois 60611
(312) 222-9350

*Counsel of Record

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